

# **EXHIBIT A**



October 2, 2017

**VIA ELECTRONIC COURT FILING**

The Honorable Jesse M. Furman  
United States District Court  
Southern District of New York

Re: *In re: General Motors LLC Ignition Switch Litig.*,  
14-MD-2543 (JMF); 14-MC-2543

Dear Judge Furman:

Co-Lead Counsel respectfully submit this response to GM's September 26, 2017 letter brief purporting to request "guidance for the parties regarding the scope of Co-Lead Counsel's representational authority" in the Bankruptcy Court.<sup>1</sup> As demonstrated below, no such guidance is necessary. GM has simply tried to force an issue that does not exist.

**A. Introduction**

GM has vociferously objected to the proposed Settlement in which the GUC Trust will request a Claims Estimate Order from the Bankruptcy Court, which may, in turn, require GM to provide approximately \$1.08 billion in GM Stock. The Settlement, if approved by the Bankruptcy Court following an extensive notice program, provides for a \$15 million payment by the GUC Trust in exchange for a release of claims against the GUC Trust's remaining assets and a waiver of any rights to seek to claw back past distributions of GUC Trust Assets. It also commits the GUC Trust to seek approval under Bankruptcy Rule 9019 of the Claims Estimate Order. In requesting a Claims Estimate Order, the GUC Trust will be following the exact procedure and process expressly set forth in the Plan, the GUC Trust Agreement, and the Amended Master Purchase and Sale Agreement to which New GM is a party (and under which GM has accepted benefits for years).<sup>2</sup> With the GUC Trust's permission, our bankruptcy counsel contacted Judge Glenn to obtain a date

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<sup>1</sup> GM's Sept. 26, 2017 Letter (the GM Letter) at 11.

<sup>2</sup> Section 3.2(c) of the Sale Agreement requires GM to issue additional shares of GM common stock (the "Adjustment Shares") when the Bankruptcy Court issues an order (a "Claims Estimate Order") estimating the allowed general unsecured claims against the Old GM estate in an amount exceeding \$35 billion, with a ceiling of issuing 30 million shares if the estimated amount equals or exceeds \$42 billion. Under the Plan and the GUC Trust Agreement, the GUC Trust has the exclusive authority to object to, settle, or seek estimation of general unsecured claims, and to seek issuance of the Adjustment Shares. *See* Plan §§ 7.1(b), 7.3; GUC Trust Agreement §§ 5.1, 2.3(d). Under the governing documents, GM does not have standing to object to, settle, or seek estimation of general unsecured claims, and is obligated to issue the Adjustment Shares once a Claims Estimate Order is entered.

to present the Settlement Agreement. Judge Glenn set a status conference for this purpose on August 17, 2017.

Within hours of our announcing the plan to present the Settlement Agreement to the Bankruptcy Court, GM issued a press release denouncing the Agreement as “collusive.” Notwithstanding that the Settlement Agreement seeks and would withstand careful scrutiny from affected stakeholders and the Bankruptcy Court, which has jurisdiction over this core matter, GM wrongly (and likely unlawfully) took matters into its own hands and interfered with the Settlement. At the August 17th hearing, the GUC Trust revealed that, after a “two-hour meeting”<sup>3</sup> with GM, the GUC Trust decided to withdraw from the Agreement.<sup>4</sup> Judge Glenn appeared skeptical that months of work, reflected in the detailed documents presented as part of the Settlement,<sup>5</sup> could be undone in two hours and ordered discovery as to how this unraveling occurred.<sup>6</sup>

A Motion to Enforce the Agreement is now pending before Judge Glenn.<sup>7</sup> A status conference before the Bankruptcy Court is scheduled for October 3, 2017. In our view, the Motion to Enforce is solidly backed by case law and the evidence submitted. GM knows this. Hence, fearful of the likely outcome of the Motion to Enforce, GM seeks to mar the proceedings before the Bankruptcy Court through a strategic end run-around to this Court by raising unfounded allegations about the actions and authority of Co-Lead Counsel in obtaining a Settlement Agreement with widespread benefits that is supported by plaintiffs and approximately 65% of GUC Trust Unitholders.

GM’s allegations are based on a flawed premise—that the Settlement Agreement relies on Co-Lead Counsel purporting to represent a class in connection with the Settlement Agreement—and ignores core facts about the Settlement Agreement. Under the Settlement, no releases are given nor plaintiffs’ rights affected until Bankruptcy Court approval of the Settlement Agreement is obtained under Bankruptcy Rule 9019. The Settlement Agreement provides for the parties to first obtain Bankruptcy Court approval of notice procedures that would include providing notice by mail, augmented by wide-spread publication notice to all potentially affected plaintiffs.<sup>8</sup> The GUC Trust would cover up to \$6 million of the cost of that notice. If Bankruptcy Court approval of the Settlement Agreement is obtained following this notice and an opportunity to be heard, then plaintiffs—who at this point either did not object or had their objections overruled by the

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<sup>3</sup> Ex. 1, Aug. 17, 2017 Hr’g Tr. at 17.

<sup>4</sup> *Id.* at 14-17.

<sup>5</sup> *Id.* at 14-19.

<sup>6</sup> *Id.* at 17, 38.

<sup>7</sup> Motion to Enforce the Settlement Agreement by and Among the Signatory Plaintiffs and the GUC Trust, dated Sept. 11, 2017 [Bankr. ECF No. 14092].

<sup>8</sup> Specifically, mail notice would be provided to (i) all persons in the United States who, as of July 10, 2009, owned or leased a defective vehicle manufactured by Old GM included in the recalls at issue in the Settlement; and (ii) all Pre-Closing Accident Plaintiffs who have filed a lawsuit against New GM or filed or joined a motion for authority to file late claims against the GUC Trust, as of the date of the Settlement Agreement.

Bankruptcy Court—would be barred from seeking remaining GUC Trust Assets or a claw back of past distributions of GUC Trust Assets. Instead, their claims against the GUC Trust, if any, would be channeled to the settlement fund. The subsequent administration of the settlement fund and determination of eligibility and criteria to obtain payment from the settlement fund (including potentially under Rule 23 before this Court) is subject to further notice and opportunity for plaintiffs to object. In short, we do not purport to act as class counsel in effectuating the Settlement before the Bankruptcy Court. Therefore, there is no need for the Court to make rulings about “the scope of Co-Lead Counsel’s representational authority.”

## **B. Background Regarding the Non-Class Nature of the Settlement**

To quote GM: “To understand the precise representational issue New GM is raising, a basic understanding of the purported settlement between Co-Lead Counsel and the GUC Trust is necessary.”<sup>9</sup> We agree. The Settlement Agreement was reached under Bankruptcy Rule 9019 and *not* in the context of a proposed class under Rule 23 of the Rules of Civil Procedure. Here are the salient points describing the non-class nature of the Settlement.

1. GM has incorrectly stated that we are settling a class of millions of claimants without authority.

2. Rather than a settlement evaluated under Rule 23, the Settlement Agreement will be implemented pursuant to Bankruptcy Rule 9019. Rule 9019(a) provides: “On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.” Settlements in bankruptcy proceedings are regularly approved using Bankruptcy Rule 9019.

3. Pursuant to the notice procedures required by the Settlement Agreement, notice will be sent to all potential claimants, informing them of the details of the proposed Settlement and their rights to object and appear at the approval hearing.<sup>10</sup> The GUC Trust agreed to pay up to \$6,000,000 in order to effectuate proper notice.<sup>11</sup> This procedure provides due process to potential claimants and fully complies with Bankruptcy Rule 9019.

4. The notice attached to the proposed settlement does not purport to be a class notice under Rule 23 because it is not such a notice.<sup>12</sup> The notice does not identify us as class counsel but rather as “Counsel to the Signatory Plaintiffs” and “Co-Lead Counsel for the Economic Loss Plaintiffs in the MDL Court,” and the notice informs claimants that they can contact “Counsel for

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<sup>9</sup> GM Letter at 2.

<sup>10</sup> See Notice of Proposed Settlement and Order (the Notice) (attached as Exhibit J to the Settlement Agreement).

<sup>11</sup> See GM Letter, Ex. A, p. 13.

<sup>12</sup> GM Letter, Exs. Q, J.



the Signatory Plaintiffs.”<sup>13</sup> We are identified in the Notice as Co-Lead Counsel in the MDL in order to advise claimants why we have the background to participate in the Settlement.

5. We do not contend that this Court ordered us to be Lead Counsel in the Bankruptcy Court or appointed us as class counsel there; nor have we taken any actions in such a capacity. Rather, counsel for various plaintiffs designated us and our designated bankruptcy counsel to take the lead in the bankruptcy proceedings, as the Bankruptcy Court recognized as early as May 2014 and has continually recognized to date.<sup>14</sup> By agreeing to a Settlement on behalf of plaintiffs who sought authority to file and prosecute late proofs of claim, all we have done is set in motion a process by which the due process rights of those with claims against the GUC Trust can be protected while they are offered the benefits of the Settlement.

6. GM has correctly stated that Plaintiffs, Ms. Barker and Mrs. James-Bivens, have sought authority to file late proofs of claims in the bankruptcy proceedings on behalf of proposed classes. But there is nothing improper about such a filing.

7. Likewise, there was nothing improper in providing the GUC Trust with expert reports estimating the GUC Trust’s exposure if there was no settlement. Those reports were not “fictional,” as GM contends. Rather, the claims estimate is supported by well-established methodologies and a sophisticated conjoint analysis. And the GUC Trust’s potential exposure is a very material and important fact to be considered in the bankruptcy proceedings.

8. In light of this exposure, the GUC Trust decided to settle. And it agreed to do so without seeking certification of a Rule 23 class.

9. The GUC Trust had sound reasons for settling. In exchange for its payment of \$15 million and its agreement to seek a Claims Estimate Order, the GUC Trust receives a release of claims to current GUC Trust Assets and the right to seek to claw back past distributions of GUC Trust Assets.

**C. Because the Proposed Settlement is Not a Class Action Settlement Under Rule 23, the Court Need Not Take Any Action in Response to GM’s Letter**

The premise of GM’s Letter is that we are attempting to use our appointment to improperly bind a class that we do not represent. GM is wrong. A key component of the Settlement is to obtain court approval of procedures to provide potential claimants with Bankruptcy Court-approved notice of the Settlement and the opportunity to be heard on the motion to approve the Settlement under Bankruptcy Rule 9019. If these plaintiffs did not object after receiving notice, or had their objections overruled, their rights to seek GUC Trust Assets or to claw back past distributions of

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<sup>13</sup> Notice at 5-6.

<sup>14</sup> See Response to New GM’s Proposed Conference Agenda, dated May 1, 2014 [Bankr. ECF No. 12677]; Ex. 5, May 2, 2014 Hr’g Tr. at 45:17-46:4, 48:1-7, 96:9-14, 99:22-100:2.

GUC Trust Assets would be waived.<sup>15</sup> This structure—not any “representational authority”—is what would bind plaintiffs.<sup>16</sup> Further, the waiver is given in exchange for a considerable benefit—the settlement fund with \$15 million and the potential triggering of the Adjustment Shares, to which plaintiffs’ claims are channeled. Plaintiffs will receive notice and an opportunity to be heard on eligibility and criteria for receiving a distribution from the settlement fund.

The touchstone for a valid settlement is that the notice satisfies due process. *See, e.g., In re Infotechnology, Inc.*, 89 F.3d 825, at \*1 (2d Cir. 1995) (unpublished) (rejecting objections of former directors of the debtor when notice of the preliminarily-approved settlement was provided to the former directors well in advance of the final plan confirmation hearing and holding that “compliance with Rule 9019 provides all the process that is due”); *In re Sullivan*, 567 B.R. 348, 354-55 (Bankr. N.D. Ill. 2017) (debtors were not denied due process because they never received notice of a settlement motion, where the trustee had mailed notice per Rule 9019(a) to the addresses provided by the debtors); *In re Magna Corp.*, No. 01-80763C-7D, 2003 WL 22078082, at \*6 (Bankr. M.D.N.C. Aug. 29, 2003) (full compliance with Rule 9019 satisfied due process where the motion for approval included “considerable detail” and was part of a “well-developed record,” where “creditors and parties in interest were afforded adequate notice and an opportunity for hearing regarding the proposed settlement,” and where the objecting party was in fact permitted to submit additional evidence and an opposition memorandum); *cf. In re Kong*, No. BAP CC-15-1371-

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<sup>15</sup> The majority of the GUC Trust Assets were distributed years ago, *see In re Motors Liquidation Co.*, 529 B.R. 510, 537 (Bankr. S.D.N.Y. 2015), and it would be extremely difficult and costly to claw back distributions. Preserving the remaining GUC Trust Assets as a recovery source pending the litigation of claims would require a stay of further distributions, conditioned on a hefty bond. When we previously tried to block distributions of GUC Trust Assets, the Bankruptcy Court granted a stay, but it was conditioned on posting a \$10.6 million bond that was not available. *See* Decision and Order on Request for Stay, dated Oct. 14, 2015 [Bankr. ECF No. 13501].

<sup>16</sup> Courts routinely hold that parties-in-interest waive objections that they fail to raise at a hearing if they received proper notice and bind parties-in-interest to a court order following notice and an opportunity to be heard. *See, e.g., In re Optical Techs.*, 425 F.3d 1294, 1301 (11th Cir. 2005) (finding that creditors who were served with a confirmation plan and disclosure statement but made no objection to confirmation waived their objections to the terms of the confirmation plan); *In re USA United Fleet Inc.*, 496 B.R. 79, 89 (Bankr. E.D.N.Y. 2013) (holding that “party on notice” of proposed sale of assets was bound by the sale order); *In re Johns-Manville Corp.*, 600 F.3d 135, 147 (2d Cir. 2010) (party who failed to raise argument in first round of appeal forfeited that argument); Ex. 6, Nov. 16, 2016 Hr’g Tr. at 43:19-23 (holding that a group of threshold issues on New GM’s motions to enforce the Sale Order and late proofs of claim against the GUC Trust could properly be brought before the Bankruptcy Court by providing plaintiffs with notice via an order to show cause). Indeed, GM has sought to bind plaintiffs to court orders in the same way in the Bankruptcy Court proceedings. *See* Ex. 2, May 17, 2017 Hr’g Tr. at 203:7-208:12 (arguing that all plaintiffs served with a scheduling order identifying certain issues to be briefed were bound by the rulings on those issues and had waived any arguments that were not raised in connection with that briefing). However, the binding nature of the Settlement following notice, an opportunity to be heard, and court approval is not an issue before the Bankruptcy Court at this time (and is premature until the Bankruptcy Court rules on the motion to enforce and a motion seeking to approve the Settlement Agreement is filed in the Bankruptcy Court). Plaintiffs reserve all rights to respond to New GM’s arguments that go to the merits of Bankruptcy Court approval of the Settlement Agreement and the Claims Estimate Order at the appropriate time.

KITAL, 2016 WL 3267588, at \*7-9 (B.A.P. 9th Cir. June 6, 2016) (bankruptcy court erred by dispensing with notice of a settlement under Rule 9019).

The notice procedures established by the Settlement Agreement fully satisfy the due process requirements of the foregoing authorities.

Thus, the entire premise of GM's Letter is incorrect. We are not improperly seeking to bind a class that we do not represent. Under the terms of the Settlement, notice to claimants is sent under well-established bankruptcy procedure. No abuse of the authority granted to us by Order No. 8 has occurred.

**D. Until The GUC Trust Settlement, GM *Never* Objected to Co-Lead Counsel's Role in the Bankruptcy Court**

Shortly after this MDL was assigned to the Court, GM brought stay and enforcement motions in the Bankruptcy Court. Given the overlap of claims before this Court and the Bankruptcy Court, Co-Lead Counsel retained bankruptcy counsel. Counsel for various plaintiffs designated them to take the lead in the bankruptcy proceedings, as the Bankruptcy Court recognized,<sup>17</sup> and they became known as "Designated Counsel" as reflected, among other places, in scheduling orders issued by the Bankruptcy Court. Here are three examples:

**May 16, 2014 Scheduling Order** (Bankr. ECF No. 12697) at 2 n.3: "Certain Plaintiffs designated the law firms Brown Rudnick LLP; Caplin & Drysdale Chartered; and Stutzman, Bromberg, Esserman & Plifka, PC (collectively 'Designated Counsel') to speak on their behalf at the Conference."

**Sept. 14, 2014 Scheduling Order re Pre-Closing Accidents** (Bankr. ECF No. 12897) at 1 n.2: "Certain plaintiffs in the Ignition Switch Actions designated the law firms Brown Rudnick, LLP; Caplin & Drysdale, Chartered; and Stutzman, Bromberg, Esserman & Plifka, PC (collectively, 'Designated Counsel') to speak on their behalf in connection with the Ignition Switch Motion to Enforce."

**Sept. 15, 2014 Scheduling Order re Monetary Relief Actions** (Bankr. ECF No. 12898) at 1 n.2 (same).

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<sup>17</sup> See Response to New GM's Proposed Conference Agenda, dated May 1, 2014 [Bankr. ECF No. 12677]; Ex. 5, May 2, 2014 Hr'g Tr. at 45:17-46:4, 48:1-7, 96:9-14, 99:22-100:2.

GM welcomed this organization, as it wanted a small group of lawyers with which to coordinate. And GM did not object when Co-Lead Counsel informed the Bankruptcy Court that they were acting pursuant to this Court's Order No. 13 to work with Designated Counsel in the Bankruptcy Court *and were doing so in their capacity as MDL Co-Lead Counsel*. Here is what we said in a December 2014 filing in the Bankruptcy Court:

**Dec. 16, 2014 Threshold Issue Brief** (Bankr. ECF No. 13025) at 1, n.1: "Lead Counsel appointed in the General Motors LLC Ignition Switch Litigation Multidistrict Litigation ... have retained the undersigned Designated Counsel, pursuant to Lead Counsel's authority under *Order No. 13 (Organization of Plaintiffs' Counsel, Protocols for Common Benefit Work and Expenses)*, dated September 16, 2014 [MDL Proceeding ECF No. 304], to brief the Threshold Issues with respect to plaintiffs who have asserted actions consolidated for pre-trial purposes in the MDL Proceedings ('Plaintiffs')."

Indeed, at a May 17, 2017 hearing, GM's bankruptcy lawyer acknowledged the role of Co-Lead Counsel and informed Judge Gerber that claimants would be bound by our actions in the Bankruptcy Court once they received notice (*exactly as contemplated under the Settlement Agreement*):

MR. WEISFELNER: I think Judge Gerber in an effort to streamline the process and make it more efficient recognized designated counsel as the primary spokesperson for both ignition switch and non-ignition switch economic loss parties, provided that other people who thought we weren't adequately addressing their concerns had the opportunity to independently address the court, but only after sort of assuring themselves that we were, to adopt the colloquial, screwing up. May 17, 2017 Hr'g Tr. at 68:19-69:1.<sup>18</sup>

THE COURT: [I]s anyone other than the name plaintiffs represented by Berman and Cabraser, would they be bound by -- assuming -- and I know it's disputed, but would they be bound by an affirmative decision by Mr. Weisfelner not to raise the clue -- the non-ignition switch plaintiff due process issues in the September scheduling order?

MR. STEINBERG: I think those plaintiffs plus those people who either got notice of or were aware of the schedul[ing] order, they all would be bound. May 17, 2017 Hr'g Tr. at 208:4-12.

As briefing in the Bankruptcy Court intensified, Co-Lead Counsel filed pleadings in the Bankruptcy Court with the designation that they were doing so as MDL Co-Lead Counsel.<sup>19</sup> GM never objected to such a designation and indeed regularly forwarded such pleadings to this Court in its status reports.

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<sup>18</sup> Ex. 2.

<sup>19</sup> See e.g., 9/18/15 Brief with Co-Lead Counsel's signatures on cover page and signature page. Ex. 3 at p. 1 and p. 21.

And in the Second Circuit, Co-Lead Counsel filed briefs with the same designation that GM is just now challenging.<sup>20</sup> GM never questioned that Co-Lead Counsel were acting as Co-Lead Counsel in the MDL while successfully pursuing an appeal from a Bankruptcy Court order.

Thus, through the many years of the bankruptcy GM has known that (i) Co-Lead Counsel deemed it their obligation to protect the interests of economic loss plaintiffs in the Bankruptcy Court; (ii) Co-Lead Counsel designated counsel in the Bankruptcy Court to work with us; and (iii) Co-Lead Counsel directly participated in the Bankruptcy Court proceedings in our capacity as Co-Lead Counsel in the MDL. During this entire process, GM never questioned Co-Lead Counsels' authority—until now while under threat of having to make a substantial payment pursuant to the express terms of the Sale Agreement, Plan, and GUC Trust Agreement.

## **E. Conclusion**

GM agreed to a specific process for resolution of claims against the GUC Trust as part of the protection it received in the bankruptcy. Plaintiffs properly invoked that process. GM's Letter is yet another attempt to evade the consequences of a bankruptcy procedure that it long ago agreed to. GM has made unfounded accusations of collusion; interfered with effectuation of the Settlement Agreement; and now, after years of watching and assenting to Co-Lead Counsel's participation in the bankruptcy proceedings, questions the basis for our doing so. Co-Lead Counsel submit there is no action for the Court to take. If anything, the Court should be pleased that Co-Lead Counsel is vigorously and creatively fighting in multiple venues to seek compensation for the Ignition Switch Plaintiffs and the Non-Ignition Switch Plaintiffs.

Respectfully,

/s/ Steve W. Berman

Steve W. Berman

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cc: GM Defense Counsel

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<sup>20</sup> See Ex. 4 cover page and p. 59.

# Exhibit 1

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg  
. Chapter 11  
.   
MOTORS LIQUIDATION COMPANY, . (Jointly administered)  
et al., f/k/a GENERAL .   
MOTORS CORP., et al, . One Bowling Green  
. New York, NY 10004  
Debtors. .   
. Thursday, August 17, 2017  
. 3:05 p.m.  
. . . . .

TRANSCRIPT OF IN COURT CONFERENCE  
(CC: DOC NOS. 14053, 14056)  
BEFORE THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 (Proceedings commence at 3:05 p.m.)

2 THE COURT: Please be seated. We're here in Motors  
3 Liquidation Company, 09-50026. This is a status conference  
4 scheduled at the request of certain parties in interest. The  
5 Court has received a flurry of letters and attachments over the  
6 last few days relating to this matter.

7 Mr. Weisfelner, I'm going to ask you to start.

8 MR. WEISFELNER: Thank you, Judge. Your Honor, first  
9 of all, welcome back from vacation.

10 THE COURT: It's been a while, actually, but --

11 MR. WEISFELNER: I'm assuming that like us, you  
12 anticipated this status conference was going to have a  
13 different tone and tenor. In any event, Ed Weisfelner from  
14 Brown Rudnick, together with my partner, Howard Steel. Your  
15 Honor, also on our side of the courtroom, William Weintraub and  
16 Gregory Fox from Goodwin Procter.

17 Your Honor, we have all three co-leads from the MDL  
18 who were also, in different capacities, signatories to the  
19 settlement agreement or intended signatories to the settlement  
20 agreement. Steve Berman, Elizabeth Cabraser, Robert Hilliard  
21 were all in transit when we heard that this hearing was going  
22 to take a different turn. Lisa Norman, I believe, is also in  
23 court to round out the -- what I'll call plaintiffs' side of  
24 the question, all intended signatories to the settlement  
25 agreement, the drafts of which were provided to Your Honor.



1           Your Honor, as you know, based on the announcement I  
2 made in open court way back in May, the parties, defined as  
3 everyone on this side of the table, the GUC Trust and, to a  
4 very important extent, the GUC Trust beneficiaries, some 66  
5 percent of all the beneficiaries represented by the Akin Gump  
6 firm, have been involved, frankly, since before May in  
7 discussing the contours of a potential resolution of any number  
8 of open matters that are on Your Honor's docket or could be put  
9 on Your Honor's docket, including late-filed claims, a  
10 propriety of late-filed claims, and the extent to which those  
11 claims could or should be allowed.

12           Your Honor, following the May announcement in court,  
13 we spent many, many months of discussion among the parties.  
14 And as I think Your Honor can see through the email chains that  
15 we provided early this morning, no later than late July, early  
16 August, there was a final deal among the parties that was  
17 subject to some additional fine-tuning of the documentation.  
18 And I'll get back to that in a minute, but there were lots and  
19 lots of submissions that crossed between the GUC Trust and the  
20 unit holders on the one hand and the plaintiffs' side on the  
21 other hand, including, in particular, expert reports submitted  
22 both by economic loss plaintiffs' retained experts and personal  
23 injury/wrongful death retained experts as to the value of their  
24 claims.

25           THE COURT: Is the pre-closing at --



1 MR. WEISFELNER: Yes, pre-closing.

2 THE COURT: -- injury or death plaintiffs?

3 MR. WEISFELNER: Correct, Your Honor. There were  
4 declarations from Mr. Hilliard, from Mr. Berman, from  
5 Ms. Cabraser, from Ms. Norman. There was even a declaration  
6 that was provided by Wilmington, the GUC Trust trustee, by a  
7 woman by the name of Beth Andrews. And again, from our  
8 perspective -- well, before I get there, we also spent a ton of  
9 time on the parties with noticed experts, in particular, with  
10 the Epoch firm, trying to devise a notice procedure for this  
11 settlement that would involve both direct mail notice in the  
12 form of a postcard with reference to an appropriate website for  
13 the longer version of the agreement, and we also worked quite  
14 hard on social media and other methodologies for ensuring that  
15 adequate notice went out to the world.

16 Now, Your Honor, no one on our side -- no one in the  
17 world, I suspect -- thought that New GM was going to welcome  
18 the development of a settlement with open arms. We thought  
19 they'd squeal. And, in fact, they started to squeal before  
20 Judge Furman this past Friday.

21 THE COURT: Well, actually, I think at an earlier  
22 hearing before me, Mr. Steinberg, when I advised that I had  
23 received a telephone call from Magistrate Judge Cott about his  
24 acting as a mediator, I think Mr. Steinberg, in substance,  
25 indicated that New GM had not been a party to any discussions.



1 So I was aware of that, at least as of that time if not --

2 MR. WEISFELNER: Certainly. And just to be more  
3 specific, the involvement of Magistrate -- and I continuously  
4 mispronounce his name, it's Cott, I think --

5 THE COURT: Cott.

6 MR. WEISFELNER: -- Cott, really involved a  
7 down-the-road step as between plaintiffs on --

8 THE COURT: He mentioned that it was mentioned at  
9 allocation.

10 MR. WEISFELNER: -- how to allocate. That's right.

11 THE COURT: We didn't talk any further than that  
12 about it, but he advised me.

13 MR. WEISFELNER: My point being that we heard from GM  
14 as recently -- not to suggest that we didn't hear from them  
15 before that, but as recently as Friday during the status  
16 conference before Judge Furman in the MDL.

17 THE COURT: Yes. I first heard about it when I read  
18 the Bankruptcy 360 report of what Judge Furman was told last  
19 Friday, I guess. When the request came for a conference this  
20 week here, I wasn't told why, but I did read the Bankruptcy 360  
21 report.

22 MR. WEISFELNER: And again, you know, this side of  
23 the courtroom, together with the GUC Trust, were accused of all  
24 sorts of collusive bad-faith conduct, and GM announced to Judge  
25 Furman it was their intent, I think, that day or soon as our



1 papers got filed with this Court to immediately seek withdrawal  
2 of the reference.

3 And, Your Honor, again everyone I think anticipated  
4 that New GM would take every available opportunity it had to  
5 contest all or any portion of the settlement agreement when it  
6 came before an appropriate court of jurisdiction, shall we say.  
7 They could have raised collusion. They could have raised  
8 impropriety. They could have raised that the estimation  
9 amounts were outrageous and not supported by the evidence.

10 They didn't choose to do any of that. They didn't  
11 choose to afford anyone, including victims, their due process  
12 day in court. They instead, from what we currently understand,  
13 insisted on a meeting with the GUC trustee, which happened I  
14 think, if today is Thursday, apparently on Tuesday of this  
15 week, a meeting to which the GUC Trust beneficiaries,  
16 represented by Mr. Goldman at Akin Gump were excluded.

17 And somehow, during the course of that meeting  
18 between GM and the GUC Trust, the GUC Trust purported to  
19 abandon not only its fiduciary duties, but a settlement that it  
20 already agreed to and to announce to us, not before 3:30  
21 yesterday, that they were, quote, "taking a different tack."

22 Now, Your Honor, this is all still fresh news to us.  
23 We've only had a couple of hours to consult with our clients  
24 and our colleagues, but I can tell Your Honor what we currently  
25 contemplate being the way forward. We know that what's on the





1 calendar are the late claims filings, and I would ask Your  
2 Honor to give us a couple of weeks to figure out how we proceed  
3 on those.

4 But frankly I think there may very well need to be  
5 some preliminary inquiries. And like many in the media, it's  
6 important to us that we gather the facts before we speak. But  
7 some things we could speak to immediately, and that is we  
8 firmly believe that what we had with the GUC Trust was an  
9 enforceable agreement under New York law, notwithstanding the  
10 fact that signatures had not been appended to those agreements.

11 THE COURT: I didn't read -- you appended to your  
12 letter a unsigned copy of the agreement, and I can't say that  
13 I've studied every aspect. I did read through it this morning,  
14 the --

15 MR. WEISFELNER: Sure. And that's absolutely true.  
16 The signatures of the GUC Trust never got appended.  
17 Mr. Golden, for the GUC Trust beneficiaries, indicated that  
18 they were done and they would sign as soon as they got word  
19 that the GUC Trust signed. We were all in possession of  
20 execution copies and ready to sign, which would have been the  
21 first step before we submitted documents to you.

22 But, Your Honor, I think as you can see from the  
23 email traffic, this wasn't a question of whether we had a deal.  
24 This was a question of finalizing documents, and in point of  
25 fact, Gibson Dunn clearly indicated they were done with all of



1 the operative documents, many of them they had the proverbial  
2 pin on, and that they were merely awaiting their clients' final  
3 consent to the form of the documents.

4 And again, Your Honor ,I don't want to argue the  
5 merits, but I firmly believe, based on everything we know and  
6 everything we've researched in the relative short period of  
7 time we have, that if we chose to, we could require the GUC  
8 Trust to perform under the agreement they had -- we think is  
9 enforceable under New York law.

10 We also believe that New GM may have liability for  
11 what I'll generally refer to as tortious interference. We are  
12 told, but have no reason to know for a fact, that the GUC  
13 Trust's about face was the subject of or occasioned by some  
14 very direct, very serious threats issued either by New GM or  
15 New GM's professionals to the GUC Trust, the administrator of  
16 the GUC Trust and their professionals.

17 And, Your Honor, in an effort to understand all the  
18 facts before we move any further forward, we are going to seek  
19 discovery from the GUC Trust, from New GM, in terms of  
20 understanding who all attended this very critical meeting this  
21 week, what discussions preceded that meeting, what, if any,  
22 inducements were made, what, if any, threats were extended, and  
23 whether the inducements crossed the line of Title 18.

24 Your Honor, that's really all I had to tell you by  
25 way of update. We are -- devastated is the wrong word. We are



1 shocked and amazed that after months of collective work by the  
2 only party that -- under the plan of reorganization for Old GM  
3 and under the GUC Trust agreement approved by new GM as the  
4 buyer, the only party in interest that has standing to  
5 deliberate on late claims and the only party authorized to take  
6 a position with regard to the allowance or estimation of late  
7 claims, the GUC Trust, after working with us for months,  
8 somehow was convinced virtually overnight to back out. And we  
9 intend to get to the bottom of that. Whether it takes efforts  
10 to discovery, whether the unitholders themselves exercised  
11 their rights under the trust agreement to replace the trustee,  
12 all remains to be seen.

13           There are a couple of other things that I think are  
14 preliminary, but I'll put them on the table in any event. The  
15 GUC Trust is possessed of material. I don't remember the exact  
16 dollar amount, 4- or \$500 million. Once upon a time, we had a  
17 proceeding before your predecessor with regard to injunctive  
18 relief, seeking to ensure that until the late claims  
19 controversy were resolved, no further distributions got made  
20 out of the GUC Trust. The record will reflect that Judge  
21 Gerber found in our favor. However, he required us to post a  
22 very significant supersedeas bond.

23           One of the interesting aspects of the reported  
24 agreement between New GM and the GUC Trust that's the subject  
25 of the letter you got from King & Spalding, I think it was

1 yesterday, is that New GM, in effect, will guarantee a rate of  
2 return. Well, that means, I presume, that if we press forward  
3 again, the supersedeas bond has, thanks to our good sponsor,  
4 New GM, been taken off the table. But, Your Honor, we can't  
5 see or stand still for subsequent distributions out of this  
6 trust under the present facts and circumstances.

7           So, Your Honor, I hope you'll give us some time to  
8 get our ducks in a row, figure out where do we go from here.  
9 I'm hearing rumors of the fact that the GUC Trust administrator  
10 wants to take a meeting with the GUC Trust beneficiaries and  
11 maybe they'll have second thoughts about abandoning this deal  
12 or second thoughts about entering into this new deal that's  
13 been offered by New GM. So there are still a lot of balls in  
14 the air. And, Your Honor, I know all of us want to get on with  
15 late claims and estimation and allowance, but if you'd give us  
16 a couple of weeks just to get our act together, we'd appreciate  
17 it.

18           THE COURT: Thank you, Mr. Weisfelner.

19           MR. WEISFELNER: Thank you, Judge.

20           THE COURT: I'd like to hear from the GUC Trust  
21 counsel next.

22           MR. MARTORANA: Good afternoon, Your Honor. Keith  
23 Martorana of Gibson, Dunn & Crutcher on behalf of Wilmington  
24 Trust Company as GUC Trust administrator.

25           THE COURT: Can I ask you why you were smirking when



1 Mr. Weisfelner was delivering his remarks to the Court?

2 MR. MARTORANA: Well, Your Honor, the reason why I  
3 was smirking was because, frankly, I was at the meetings. And  
4 to be totally candid with Your Honor, the only people that were  
5 at the meetings were counsel for New GM and counsel for the GUC  
6 Trust. There were no principals at the meeting, although we,  
7 of course, spoke with principals afterwards.

8 The concept that any of this discovery, which, I  
9 mean, to the extent we file a motion, which I think was  
10 anticipated, certainly might be acceptable, I mean, with  
11 reservation of --

12 THE COURT: What motion are you going to file?

13 MR. MARTORANA: We're -- our intention is to file a  
14 9019 motion seeking approval of the deal, the proposed deal  
15 with New General Motors. That deal, Your Honor, was outlined  
16 in a letter that we filed yesterday.

17 THE COURT: I read the letter.

18 MR. MARTORANA: Okay. So just to get back to your  
19 question, Your Honor, I was obviously -- I was at that meeting.  
20 The concept that there was any untoward threats or anything  
21 that was illicit that happened at that meeting, in my view, is,  
22 I mean -- well, I guess the discovery will show it, if we have  
23 discovery, but it just frankly didn't happen. So that is why I  
24 was smirking, Your Honor. At the end of the day --

25 THE COURT: It didn't seem very funny to me, but you



1 seemed to think so.

2 MR. MARTORANA: What's that?

3 THE COURT: I was watching you as Mr. Weisfelner was  
4 delivering his remarks, and you seemed to think it was funny.

5 MR. MARTORANA: Well, Your Honor, I mean, I didn't  
6 think -- I thought it was --

7 THE COURT: This is a serious matter.

8 MR. MARTORANA: I agree it's a serious matter, Your  
9 Honor. I definitely do not disagree with that. I just did  
10 not, frankly, understand. I think that it's a stretch -- I  
11 mean, obviously he wasn't there, but I think it's a stretch to  
12 think that that --

13 THE COURT: When was the meeting?

14 MR. MARTORANA: The meeting was on, I believe,  
15 Tuesday, Tuesday of this past week.

16 THE COURT: And who was present?

17 MR. MARTORANA: Mr. Steinberg, Mr. Davidson, myself,  
18 Mr. Williams, and Mr. Gillette, who are over in the corner.  
19 Those were the only participants in the meeting.

20 THE COURT: And --

21 MR. MARTORANA: Oh, and I'm sorry, there was someone  
22 on the phone from Kirkland & Ellis, as well, Mark Nomellini  
23 from Kirkland & Ellis.

24 So, Your Honor, the fact of the matter is, you know,  
25 obviously we have -- I don't disagree with Mr. Weisfelner's



1 statements that we had been working with him --

2 THE COURT: It just happened -- you know, as I said  
3 earlier, I didn't read the proposed settlement agreement in  
4 detail. It's a very lengthy --

5 MR. MARTORANA: It is.

6 THE COURT: -- exhibit, but it would seem to have  
7 reflected a very considerable amount of time in negotiating the  
8 agreement in the various --

9 MR. MARTORANA: It did.

10 THE COURT: -- exhibits. Can you tell me --

11 MR. MARTORANA: It did. I do not disagree with that.

12 THE COURT: Can you tell me approximately how long  
13 the negotiations were going on.

14 MR. MARTORANA: Well, I think I would say that the  
15 concept of negotiations had been going on for, I mean, probably  
16 close to a year, I think.

17 THE COURT: Well, without the concept. These were  
18 very --

19 MR. MARTORANA: The actual true --

20 THE COURT: Stop. Wait until I finish my questions.

21 Attached to Mr. Weisfelner's letter as -- are various  
22 exhibits, voluminous exhibits, but the settlement agreement is  
23 -- and its immediate exhibits are quite voluminous. Can you  
24 tell me how long the negotiations and drafting of the actual  
25 settlement documents went on for?





1 MR. MARTORANA: I would say about two months I think  
2 is probably accurate, but --

3 THE COURT: And you had one meeting with New GM this  
4 week that caused Wilmington Trust to abandon the settlement  
5 agreement?

6 MR. MARTORANA: We did, Your Honor.

7 THE COURT: One meeting. Okay.

8 MR. MARTORANA: One meeting. Yes, we did, Your  
9 Honor. In our view, as a fiduciary, we were initially willing  
10 to go forward with the deal, with the settlement as presented.  
11 Obviously it was --

12 THE COURT: And what is it --

13 MR. MARTORANA: -- never signed off on.

14 THE COURT: And what is it that New GM said that  
15 persuaded your client to abandon the deal that had been under  
16 discussion for considerable time and negotiation of documents  
17 for quite a long time?

18 MR. MARTORANA: Well, certainly they reminded of many  
19 of the things we already knew, which was the risk --

20 THE COURT: Go ahead. None of this is privileged, so  
21 tell -- I want to hear what you have.

22 MR. MARTORANA: Sure. They reminded us of all the  
23 risks that were associated with the proposed settlement, in  
24 particular the execution risks, which I can get into if you'd  
25 like. But there were certainly numerous execution risks.



1 THE COURT: Well, there's going to be discovery, so I  
2 would like to hear now -- and it probably will inform the  
3 discovery.

4 MR. MARTORANA: Sure.

5 THE COURT: And I'm sure you'll be complete in  
6 telling me what was -- how long did the meeting last?

7 MR. MARTORANA: Maybe two hours --

8 THE COURT: Okay.

9 MR. MARTORANA: -- at most, I would say.

10 THE COURT: And were documents circulated to you in  
11 advance of the meeting?

12 MR. MARTORANA: No, there were no documents  
13 circulated.

14 THE COURT: Was the decision to abandon the  
15 settlement made at the meeting?

16 MR. MARTORANA: The -- well, again, there were no  
17 principals there, so there was no decision that could be made  
18 at that meeting. There was an offer that was floated, which  
19 was tentative. We followed up with our principals. They  
20 followed up with their principals. And then, over the next day  
21 or so, that proposal was boiled down to something more  
22 concrete.

23 THE COURT: And tell me what the proposals that New  
24 GM made to you at the meeting.

25 MR. MARTORANA: Well, the proposal that they made at



1 -- the first proposal that they made was continuing litigating  
2 and we will pay your litigation costs against the plaintiffs.  
3 That was the initial proposal that they made. We ultimately  
4 said, it's interesting, that sounds like something that we  
5 might be able to work with, but at the end of the day, what our  
6 two main concerns here are, that we're continuing a litigation  
7 really for the benefit of New GM. We feel like we've been  
8 pulled into this, so obviously we're worried about spending  
9 trust -- unitholder money for those purposes.

10 But then the -- a secondary or perhaps even bigger  
11 issue is that at some point, probably after the term loan  
12 litigation is fully and finally resolved, the GUC Trust will be  
13 in a position to make a distribution to unitholders. At this  
14 point the GUC Trust cannot make a distribution to unitholders  
15 until we figure out whether or not the 502(h) claim of the term  
16 loan defendants is legitimate. But at some point that will be  
17 resolved, our mediation settlement or otherwise, and then we'll  
18 be in a position to make a distribution. And to the extent --

19 THE COURT: Anybody who negotiates a settlement with  
20 you better be careful because they may spend months doing it,  
21 only to have you pull the rug out from under them at the last  
22 hour. You're smiling again.

23 MR. MARTORANA: I'm sorry, I guess the question was I  
24 didn't -- I don't understand --

25 THE COURT: My comment was that anybody who



1 negotiates a settlement with you better be careful because you  
2 may well pull the rug out from under them after months of  
3 negotiation. That was my comment as to which you had your big  
4 grin on your face again.

5 MR. MARTORANA: Well, I apologize, Your Honor. But  
6 at the end of the day, we are a fiduciary and we're going to  
7 act in our fiduciary capacity. And if that means abandoning a  
8 proposal --

9 THE COURT: And what other proposals did New GM make  
10 to you that you considered in, I assume -- well, I won't ask  
11 you what you recommended to your client. What other proposals  
12 did New GM make to you in the form of consideration for  
13 abandoning the deal with the plaintiffs?

14 MR. MARTORANA: Sure. So again, getting back to the  
15 point about a distribution, we said our two main concerns were  
16 that we're continuing a litigation. It's -- there's been a  
17 number of costs that have been associated with that obviously.  
18 It's continuing to pull down on trust assets.

19 And then the secondary aspect is that if we are in a  
20 position to make a distribution and these claims continue to be  
21 out there, there is no way that we're going to -- well, we  
22 probably would not be able to make a distribution over the  
23 existence of those claims. And we would therefore -- currently  
24 we're investing our assets -- required to invest our assets in  
25 treasuries, and that is not really going to be a sufficient



1 rate of return that we could otherwise get if this deal were to  
2 go forward, and this deal -- the plaintiffs' deal, and if we  
3 were able to get the releases that we would be hoping for under  
4 that -- under the plaintiffs' deal.

5           So the offer after further discussion that was made  
6 was that New GM would be potentially willing to provide us with  
7 a rate of return. We don't know what that would be. We've  
8 agreed that we would enter into good-faith negotiations to  
9 determine what that rate of return would be because, among  
10 other things, we don't know what the corpus of the trust will  
11 be at that time. So it's hard to come to something -- to that  
12 kind of agreement today.

13           But those -- we felt that those two things,  
14 particularly given the fact that we believe on the merits we  
15 have very strong arguments against the late claims, on Pioneer,  
16 on equitable mootness, on tolling arrangements, that this offer  
17 from New GM dealt with the main concerns that we were -- that  
18 we had. And as a fiduciary, we felt that we needed to do that.  
19 We felt that you don't necessarily go for -- I understand that  
20 hedge funds want to go for the absolute home run at the risk of  
21 \$21 million and everything else out there, but we represent  
22 all --

23           THE COURT: What's the \$21 million?

24           MR. MARTORANA: So the way that the plaintiffs'  
25 proposal would work is that the GUC Trust would, up front, pay



1 \$6 million for purposes of noticing. So that would be out the  
2 door before we even really get in front of Your Honor. That  
3 would just be a sunk cost for postcards. And then it would be  
4 followed by a \$15 million payment and our agreement to support  
5 a \$10 billion claim as against New GM. And we felt, among  
6 other things, that there was a significant amount of execution  
7 risk associated with that. And, frankly, among other things,  
8 that proposal, what we were really hoping to get out of it was  
9 a release, get a true release from all the plaintiffs.

10           Given the fact that that proposal did not contemplate  
11 and the plaintiffs would not agree to a Rule 23 settlement  
12 certification, I think there's a potential execution risk  
13 associated with actually accomplishing what it was that we  
14 wanted to accomplish.

15           THE COURT: Okay. Anything else you want to tell me  
16 now?

17           MR. MARTORANA: No. Thank you, Your Honor.

18           THE COURT: All right.

19           Mr. Golden, I'd like to hear from you next.

20           MR. GOLDEN: Yes. Good afternoon, Your Honor.

21 Daniel H. Golden, Akin, Gump, Strauss, Hauer & Feld, counsel  
22 for what's known as the participating unitholders.

23           Your Honor, this is really unfortunate that we find  
24 ourselves in this situation where everybody now, in open court,  
25 has to air their dirty laundry about a settlement that I think



1 was agreed to in principle. I will say for the record I can  
2 confirm the factual recitation that Mr. Weisfelner made as to  
3 the facts leading up to the announcement by New GM and the GUC  
4 Trust of their -- of GUC Trust's disavowal of that settlement  
5 agreement and their intention to enter into a purported new  
6 agreement with New GM.

7           Your Honor, I think it's clear something very odd is  
8 going on here. We worked arm in arm, shoulder to shoulder,  
9 with the GUC Trust, Wilmington Trust as the trustee and the  
10 trust administrator, and with its counsel, Gibson Dunn, over  
11 several months to negotiate and document a settlement. We had  
12 many, many, many conversations, drafting sessions, redrafting  
13 sessions to get to a point where we were, as of last Friday, to  
14 get to a settlement, a global settlement as between the  
15 plaintiff class, the GUC Trust, and the unitholders.

16           So let's talk a minute about who we represent. We  
17 represent 65 percent of the unitholders. That is the  
18 shareholders of the trust. They are the only beneficiaries of  
19 the trust should the reserves be freed up. That's the reserves  
20 of the 4- or 500 million that Mr. Weisfelner referred to, and  
21 we represent 65 percent.

22           Look, I've worked really closely with the Gibson Dunn  
23 lawyers. I like them. But to hear them talk about that they  
24 have fiduciary duties, yes, they do. Wilmington Trust has  
25 fiduciary duties. They have fiduciary duties to my clients.





1 Now, we don't represent all of the unitholders, but everyone  
2 who has raised their hand and said, "I'm here and I want to get  
3 involved," we represent them.

4 We worked really hard to get to this global  
5 settlement, which would have had the benefit or the result of  
6 eliminating all the late-claim litigation and all the  
7 underlying allowance of those claims. We think that that's a  
8 settlement that this Court would have welcomed. And that's  
9 why, in part, we worked so hard to get there. But in a blink,  
10 in really literally a blink, without any conversation to the  
11 unitholders or their counsel, without any invitation by Gibson  
12 Dunn or Wilmington Trust to say, we've met with GM, they have  
13 an alternative proposal on the table, we'd like to get your  
14 views on it.

15 We certainly shared views with them for months and  
16 months, but when it came to the point where they were willing  
17 to disavow that settlement and consider a new settlement which  
18 does not work for the participating unitholders, we sent a  
19 letter to Your Honor this morning so that there's no mistake.  
20 All of the unitholders we represent will not and do not support  
21 the proposed settlement with GM.

22 So you have to ask the question, what is Wilmington  
23 Trust thinking about when they want to go forward with a  
24 settlement that has the disapproval of every fiduciary that it  
25 represents who's weighed in on the subject? Now, I'm not



1 saying that Wilmington Trust, who as an institution we worked  
2 with for years. Frankly, I'm just surprised we find ourselves  
3 in this situation given our prior relationship and experience  
4 with Wilmington Trust. But what are they thinking about going  
5 forward with a settlement over what will be active opposition  
6 by the unitholders? Something --

7 THE COURT: Well, active opposition by New GM to the  
8 proposed settlement that was --

9 MR. GOLDEN: That's right.

10 THE COURT: I mean, one way or the other, there's  
11 going to be active opposition.

12 MR. GOLDEN: That's absolutely right. But the one  
13 difference is the trust has no fiduciary obligations to New GM.  
14 They do have fiduciary obligations to our client. And I  
15 confirm or reaffirm what Mr. Weisfelner said, that we did  
16 expect active opposition from New GM. We've had active  
17 opposition from New GM almost throughout the inception of these  
18 matters, so that's not a total surprise. But what is  
19 shockingly surprising to us is what was the motivation, what  
20 was the rationale, what happened at that two-hour meeting to  
21 have this absolute sea change.

22 Now, look, everybody's imagination can run wild.  
23 Were there threats? Were there inducements? But there was  
24 something there that caused, in two hours, for Wilmington Trust  
25 and its counsel just to disavow five months of hard work, and



1 we intend to find out what it is. It's odd to us that we had  
2 been originally -- when I said "we," the participating holders,  
3 through their counsel, had been invited to the meeting that GM  
4 had scheduled with Wilmington Trust, and then promptly  
5 disinvented.

6 THE COURT: Who disinvented you?

7 MR. GOLDEN: We were advised by counsel for  
8 Wilmington Trust that we were not -- we were no longer invited  
9 to it. I didn't question them. I accepted that at face value.  
10 I don't know who demanded it, but that's where the  
11 communication came from.

12 Your Honor, I don't want to make this situation  
13 worse. We intend, to the best of our ability, still to work  
14 with our trustee. But if we can't, then we're going to  
15 consider our alternatives, and that is not a threat, but it  
16 just -- it's a recognition of the reality of the situation that  
17 we find ourselves in.

18 This case, this overhang of the plaintiffs' claim,  
19 have held this trust in abeyance for a very long time. The  
20 goal of this settlement was to, once and for all, be done with  
21 the plaintiffs, get an absolute, full-bore release from the  
22 plaintiffs in exchange for us doing the \$6 million of noticing  
23 costs -- and I'll come back to that in a second -- and a  
24 \$15 million payment. Part and parcel of that overall  
25 settlement agreement, but not interdependent upon getting the



1 release, was the agreement of the GUC Trust, supported by the  
2 participating holders, to estimate the totality of the  
3 plaintiffs' claims at somewhere around \$10 billion, which would  
4 have the effect of triggering what's known as the accordion  
5 shares. I know that's the part that GM doesn't like. But they  
6 would have every opportunity to object to that estimated  
7 settlement of \$10 billion. We weren't looking to deprive them  
8 of their ability to do that.

9           This conference, because Your Honor remarked that it  
10 wasn't originally made clear to Your Honor what the purpose of  
11 this conference was, was to preview that settlement proposal  
12 with you. We were certainly going to invite New GM, and we  
13 thought it would be professionally courteous of us to advise  
14 New GM in advance of the terms of our proposed settlement,  
15 which Mr. Weisfelner and I did in a telephone call with  
16 Mr. Steinberg and a partner whose name I forget at Kirkland and  
17 Ellis last Wednesday.

18           Well, what did they do with that courtesy? They  
19 turned around, without any notice to us, and complained to  
20 Judge Furman. Why Judge Furman? I'm not sure. These matters  
21 aren't before Judge Furman. This settlement certainly wasn't  
22 going to be before Judge Furman. But it was their attempt, I  
23 surmise, to attempt to start to poison the well. Well, I was  
24 very glad that Judge Furman's reaction was, take that up with  
25 the bankruptcy court.



1 THE COURT: I should say I -- whenever I've had a  
2 conversation with Judge Furman, I've disclosed that I have.  
3 And I had a brief telephone conversation with Judge Furman on  
4 Tuesday morning. He left a voicemail for me on Monday evening  
5 and I -- we spoke on Tuesday. I -- he wanted me to be -- he  
6 wanted to be sure that I knew that there had been a  
7 presentation before him, or statements before him, that a  
8 settlement had been reached. I told him that I read the  
9 Bankruptcy 360 report about it. I told him that there had been  
10 a request for a conference here, I had scheduled it, I hadn't  
11 been informed at the time what the conference was about, but I  
12 had scheduled it. And that was the substance of the phone  
13 conversation that I had with Judge Furman.

14 So I've tried to make a point, whenever he and I have  
15 spoken, I've put it on the record. We do not talk about the  
16 merits of anything, but we informed --

17 MR. GOLDEN: So --

18 THE COURT: -- each other of procedural posture of  
19 things.

20 MR. GOLDEN: So continuing, we had had the  
21 conversation with Mr. Steinberg and his colleague. The purpose  
22 of scheduling a status conference with you, Your Honor, was to  
23 preview the settlement, not to argue the merits, but really to  
24 preview the noticing procedures that we intend to follow  
25 because this settlement contemplated a global release from all



1 the claims. And we were going to do -- when I say "we," the  
2 GUC Trust was going to do and spend \$6 million on noticing to  
3 make sure the plaintiffs -- something that Old GM never really  
4 got around to doing, and that's why we find ourselves in this  
5 mess. But we were going to give direct notice to every party  
6 who was the subject of a recall notice, so that's over  
7 12 million parties, as well as notice to every party who has  
8 started a lawsuit against Old GM/New GM based upon a presale  
9 accident claim, so that nobody could complain this time that  
10 the world has been put on notice as to the proposed settlement.

11 But we wanted to get a sense from Your Honor before  
12 we went out and spent \$6 million whether Your Honor thought  
13 that would be an appropriate scope of notice. That's all we  
14 had originally intended to do at the status conference. Well,  
15 obviously events and facts have overtaken it, and we are where  
16 we are.

17 Again, I'm here representing economic players.  
18 They're not looking to go for the home run, as Mr. Martorana  
19 said. What they're looking for is peace in the valley. They  
20 want to get rid of the plaintiffs' claims and the plaintiffs'  
21 claims against the trust for all time so that when the  
22 avoidance action is settled or finally resolved, a final  
23 distribution could be made.

24 THE COURT: What's the face amount of the  
25 approximately 65 percent of the unitholders -- of the claims of

1 the unitholders you represent?

2 MR. GOLDEN: So it's not in dollar amount; it's  
3 number of units.

4 THE COURT: Units.

5 MR. GOLDEN: Can I confer with my colleagues?

6 THE COURT: Yeah, go ahead, sure.

7 (Counsel confer)

8 MR. GOLDEN: It's 21 million units out of  
9 approximately 31 million units.

10 THE COURT: Okay. All right. Thank you, Mr. Golden.

11 MR. GOLDEN: Thank you, Your Honor.

12 THE COURT: Mr. Steinberg.

13 MR. STEINBERG: Your Honor, Arthur Steinberg from  
14 King & Spalding on behalf of New GM.

15 Mr. Weisfelner, in his presentation, said that he did  
16 not want to speak prematurely until he gathered the facts, and  
17 then he proceeded to speculate as to what the facts may be.  
18 And there's a temptation that I have to be able to try to  
19 respond to each and every time that he misstated what happened.  
20 However --

21 THE COURT: Let me say first, I thought your letter  
22 to the Court was intemperate and inappropriate. You could have  
23 raised the issues that you raised. So I know that there's very  
24 strong feelings on -- there's more than two sides here -- on  
25 all sides, but I didn't appreciate the tone of your letter.



1 But go ahead.

2 MR. STEINBERG: Your Honor, you're referring to the  
3 letter that I sent on Tuesday as --

4 THE COURT: Yes, I am.

5 MR. STEINBERG: The reason why -- just to explain  
6 that letter on Tuesday is that, as Mr. Golden said, that on  
7 August 9th, we had a telephone call with Mr. Weisfelner and  
8 Mr. Golden. What Mr. Golden left out was that on the agenda  
9 letter for the MDL on August 11th, under the section under  
10 successor liability, the specific question of whether late  
11 claims are being sought in the bankruptcy court would have  
12 relevance to the briefing on successor liability, and the judge  
13 wanted to know whether something had to be done or not. So if  
14 there was going to be a resolution of the late claims --

15 THE COURT: Well, the fact that you raised it with  
16 Judge Furman doesn't bother me in the least. What I'm  
17 complaining -- what I'm commenting on is I thought the tone of  
18 your letter to me was inappropriate.

19 MR. STEINBERG: Your Honor, it's never my intention  
20 to write an inappropriate toned letter to Your Honor. And to  
21 the extent that we did, then we apologize. The reason for the  
22 letter was that this status conference was scheduled without  
23 our participation, without being in compliance with Your  
24 Honor's rules as to scheduling a status conference, and because  
25 I expected that what was going to happen at the scheduling --





1 at the status conference was that they were going to try, in  
2 effect, to get an advanced blessing on a notice provision in  
3 connection with --

4 THE COURT: Well, that wouldn't -- I can assure you  
5 that that would not happen.

6 MR. STEINBERG: But that's what I was essentially  
7 told on August 9th and that they were going to ask Your Honor  
8 to compel New GM to produce information so they can comply with  
9 their notice obligation, and they were all going to try to do  
10 that in a chambers conference with Your Honor, presumably off  
11 the record. And that was why I wanted to write to Your Honor  
12 that if there was going to be a chambers conference, it really  
13 should be in open court, it should be recorded, and that if  
14 they wanted to have specific relief that they were going to  
15 request at the conference, that I should be able to see that in  
16 writing and to have the ability, Your Honor, to give you our  
17 version of why you should not be able to do that so Your Honor  
18 would be able to make a ruling on an informed record. And that  
19 was the motivation --

20 THE COURT: I don't make rulings at chambers  
21 conferences. I don't have chambers conferences if any parties  
22 in interest object to having chambers conferences. I do them  
23 in open court as we're doing today on the record. So I very  
24 rarely -- occasionally I will have a chambers conference, but  
25 only if all parties in interest affected by the discussion are



1 present. I just want to assure you of that, Mr. Steinberg.  
2 And I don't grant relief in a chambers conference. Everything  
3 happens in court on the record.

4 MR. STEINBERG: Now, Your Honor, I think that -- to  
5 some extent that there will be a motion filed, presumably by  
6 the GUC Trust, to reference the arrangement that was agreed to  
7 with New GM, and there will be a pleading that will be filed.  
8 There will be an opportunity to object. We will have the  
9 opportunity to put in what really happened and why the GUC  
10 Trust had changed its position. And it wasn't because anybody  
11 induced anything. It was because what they had proposed was  
12 what Mr. Martorana described as execution risk. Our belief was  
13 it was impossible to get to that point in time.

14 The reality was -- is that they were proposing a  
15 settlement where a person who was paying the liability was New  
16 GM on account of a \$10 billion claim which we thought had no  
17 basis in reality in connection with primarily time-barred  
18 claims where the plaintiffs had purposefully not pursued  
19 remedies against Old GM for years after the recalls were  
20 announced, and that they had rolled over on those defenses on  
21 late claims without giving any credence to that value.

22 THE COURT: Well, Judge Gerber had determined that  
23 there was equitable mootness, and it wasn't until the Second  
24 Circuit reversed and specifically referenced the accordion  
25 provision in its opinion that at the first conference I had, I



1 think, after the Second Circuit opinion, I raised the question  
2 about late claims because it seemed clear to me, A, the Second  
3 Circuit had reversed with respect to equitable mootness, that  
4 there was the potential for substantial new value. I asked the  
5 question -- I think I asked the question of you, I asked the  
6 question of Mr. Weisfelner, how close to the \$35 billion  
7 threshold of allowed unsecured claims were you.

8           And because that's -- as I -- I didn't go back and  
9 read it again, but my recollection is that was the trigger  
10 point for additional New GM shares. So I think it must have  
11 been very close to the first hearing when I presided after the  
12 Second Circuit opinion that I raised those questions. And  
13 we've had a discussion since then about motion for late claim.  
14 You wanted to take discovery about the Pioneer factors. I  
15 authorized discovery regarding the Pioneer factors.

16           So there's a history here, Mr. Steinberg. You don't  
17 have it quite right. All right. I don't know whether the  
18 settlement that was proposed that's unsigned -- Mr. Weisfelner  
19 believes it's enforceable under New York law. There's a whole  
20 body of law about when an agreement can be enforceable. I'm  
21 not taking any position about it at all, whether it's  
22 enforceable or not. I don't know whether it would have been  
23 approved over New GM's objection. Not taking a position about  
24 that. It just -- the events of the last week, I've had a  
25 couple of letters that indicated that the plaintiffs believed

1 they were making progress with the GUC Trust in its settlement  
2 negotiations. But I stay out of settlement negotiations.  
3 Okay? When Magistrate Judge Cott called and asked if I  
4 objected to his being a mediator, I made clear I didn't, and I  
5 informed everybody in court about that call.

6 So there's a history, not quite what you describe it  
7 as. I want -- go ahead and finish, and then I'll say what I --

8 MR. STEINBERG: Your Honor, the history that you may  
9 not be aware of that preceded your handling of this case was  
10 that Judge Gerber, in connection with the first distribution  
11 that was made by the GUC Trust in 2014, did not see anybody  
12 trying to block that distribution. And when he confronted on  
13 the oral argument on the four threshold issues, when he asked  
14 Mr. Weisfelner, why didn't you do anything to block the  
15 distribution, why didn't you sue Old GM for your Old GM  
16 liabilities, why did you only sue New GM under a successor  
17 liability, he said it was a tactical decision that they had  
18 made to only pursue New GM.

19 In Judge Gerber's April 2015 sale decision, he  
20 specifically references the tactical decision made by the  
21 plaintiffs not to sue Old GM, but only to sue New GM as one of  
22 the bases to support his equitable mootness finding, that they  
23 had, in effect, precipitated what went on.

24 The two threshold issues, Your Honor, that you asked  
25 us to brief in connection with the late claims issue was, one,

1 was there a tolling agreement and when -- if there was, when  
2 did the tolling agreement take place. And that was one of the  
3 issues because one of our arguments is that even after the  
4 announcement of the recalls and before the equitable mootness  
5 issue was even raised by Mr. Golden to add as a threshold  
6 issue, the plaintiffs had tactically decided not to sue Old GM  
7 in the face and the knowledge of the recalls. That is an  
8 argument. They have always had the ability to file late  
9 claims --

10 THE COURT: We may get there, Mr. Steinberg, because  
11 if I have to go on and address the late claim motion as a class  
12 claim, I will. Okay?

13 MR. STEINBERG: Your Honor, I --

14 THE COURT: It's premature for me to hear the  
15 arguments now.

16 MR. STEINBERG: Right. Your Honor, it's -- the only  
17 thing I would like to say to you is that there is a large  
18 portion of things that were said to you today that are either  
19 misleading or would benefit from context, written context,  
20 written pleadings to be able to understand it. I have a list  
21 of things that I jotted down. I don't think necessarily a  
22 conference is the time to do it, but I do want to say one issue  
23 as long as I have Mr. Berman here in court because Mr. Berman  
24 said in the MDL, and Mr. Weisfelner repeated it at the  
25 conference, on page 38, he said, "I'm pretty confident that the



1 sale agreement actually gives New GM no rights to object."  
2 Now, you heard Mr. Golden say, "Of course, New GM always would  
3 have the right to object." But Mr. Berman's lawyer in this  
4 case is Mr. Weisfelner.

5 And before Your Honor was -- took over this case in  
6 2015, at the status conference before Judge Gerber on  
7 July 16th, Mr. Weisfelner said if we were -- meaning as, on the  
8 one hand, GUC Trust unitholders and on the other hand able to  
9 consummate a settlement, it would be brought to the Court's  
10 attention under Rule 9019, I presume either in this court or to  
11 Judge Furman, depending on the resolutions of the motions to  
12 withdraw the reference on notice to New GM. And New GM will  
13 have an opportunity to oppose that 9019, take the position  
14 that, as Your Honor indicated, we colluded, in effect, to stick  
15 it to New GM, and they'll be entitled to be heard on the merits  
16 with regard to that contention, and the settlement will not be  
17 effective unless and until the Court overrules the objection.

18 So Mr. Berman told Judge --

19 THE COURT: Well, the settlement isn't going to be  
20 effective until I approve it unless --

21 MR. STEINBERG: That's correct.

22 THE COURT: -- the reference is withdrawn and Judge  
23 Furman deals with it.

24 MR. STEINBERG: But this is --

25 THE COURT: So whether -- you know, the issue of New



1 GM's standing can be dealt with at an appropriate time.

2 MR. STEINBERG: The only thing that I --

3 THE COURT: Today is not the time.

4 MR. STEINBERG: Right. The only thing I just wanted  
5 to highlight was that you heard Mr. Weisfelner say today and  
6 Mr. Berman say in the MDL conference that New GM would not have  
7 standing, and all I wanted to do is provide --

8 THE COURT: I didn't hear anybody tell me that New GM  
9 doesn't have standing. I called you to the podium, and we'll  
10 see.

11 MR. STEINBERG: No, no. Mr. Weisfelner I think  
12 actually alluded to that, as well, too, but --

13 THE COURT: I don't think he did. I don't think he  
14 did.

15 MR. STEINBERG: But certainly Mr. Berman did on the  
16 MDL conference.

17 THE COURT: Perhaps he did before Judge Furman. I  
18 haven't read the transcript of what took place before Judge --

19 MR. STEINBERG: It's attached to one of the letters.

20 THE COURT: Yes, I know. There's a voluminous stack  
21 of papers that --

22 MR. STEINBERG: And so, Your Honor, I go through  
23 this --

24 THE COURT: I read as much of it as I could.

25 MR. STEINBERG: I go through this not to be able to



1 argue New GM's standing in connection with a proposed  
2 settlement. That is not before Your Honor. I only do that for  
3 one reason, which is that what you've heard today is -- to some  
4 extent needs to be put in context, needs the benefit of written  
5 pleadings to be able to make a presentation to Your Honor so  
6 that you're able to think about it before you take to the bench  
7 instead of having it presented in a disjointed way.

8 THE COURT: Here's how we're going -- well, first,  
9 all right, anything else, Mr. Steinberg?

10 MR. STEINBERG: Only that -- I think that's it, Your  
11 Honor. Thanks.

12 THE COURT: Okay. Anybody else wish to be heard?

13 All right. Mr. Martorana indicated that he  
14 anticipates making a 9019 motion asking the Court to approve  
15 the settlement between the GUC Trust and New GM.

16 Mr. Weisfelner articulated a position that he  
17 believes that the plaintiffs have an enforceable agreement  
18 under -- was the written agreement governed by New York law?

19 MR. WEISFELNER: Yes, Your Honor.

20 THE COURT: Okay. He believes that the plaintiffs  
21 have an enforceable agreement, even though there's nothing  
22 signed, against the GUC Trust. I'm not going to -- I may well  
23 hear both motions at the same time. It's clear that discovery  
24 needs to take place. I direct that counsel meet and confer  
25 promptly and discuss discovery and set forth, hopefully, an



1 agreed plan of discovery that will cover both proposed  
2 settlements. To the extent there are disagreements, they can  
3 be presented to me. With respect to discovery disputes  
4 generally, I don't require formal motions. We can schedule  
5 another conference fairly soon. I want you to meet and confer  
6 and see if you can resolve issues about discovery within the  
7 next week. I understand people have vacations and -- you know,  
8 within two weeks you ought to be able to resolve those issues.

9           Get a date from Deanna for another conference in  
10 court, open court status conference. If you have a stipulation  
11 on a plan of discovery, you can present it to me without a  
12 hearing. If not, we'll take it up in early September and try  
13 and get that resolved.

14           I've heard a lot of things in a short amount of time  
15 today. I don't know whether the trust agreement includes  
16 provisions on threshold levels to change the trustee, for  
17 example. I don't know how that works, and at this stage I  
18 don't really want to know how it works. But certainly that was  
19 an issue that was raised today as to the possibility that  
20 unitholders are going to seek to replace the trustee. I'm not  
21 advocating at all. Any matters that Wilmington Trust has been  
22 involved in that I've presided over, they've done a very  
23 professional job. I have no reason to think that they didn't  
24 do so here. But there are a lot of moving parts. So at a  
25 status conference in early September, I would like to know



1 quite specifically how the parties collectively propose to  
2 proceed.

3           So what I've heard is at least two -- and I'm not  
4 setting a deadline for the GUC Trust to file a 9019 motion. I  
5 want fairly soon. It doesn't have to be before we have a  
6 conference in early September, but I do want that fairly soon.  
7 This has got to get -- you know, if there's no settlement, if  
8 the GUC Trust's proposed settlement with New GM is rejected, if  
9 there's no enforceable settlement by the plaintiffs with the  
10 GUC Trust, we'll go forward with the contested motion for leave  
11 to file a late class claim and we'll just head down that  
12 litigation road if that's the direction it's going to go.

13           There may be other issues that some or all of you  
14 wish to raise, and I want to make clear to all of you any  
15 pleadings or correspondence with the Court needs to be civil in  
16 tone and identify those issues which, in good faith, people  
17 believe there needs to be discovery or needs to be presented to  
18 the Court in an appropriate context, motion, I assume.

19           Anything else anybody wants to raise today?  
20 Mr. Steinberg?

21           MR. STEINBERG: Your Honor, I understand clearly the  
22 notion about discovery and working with -- on a meet and  
23 confer, but right now we presumably will have a pleading by the  
24 GUC Trust, I presume to put forth the New GM agreement. We  
25 don't have anything on the other side.



1 THE COURT: Well, you only pulled the rug out from  
2 under them yesterday. Why am I not surprised? They thought  
3 they had an agreement with the GUC Trust --

4 MR. STEINBERG: No, no, Your --

5 THE COURT: -- Mr. Steinberg. And they have a very  
6 voluminous set of documents. Are you going to give notice to  
7 the same group of people that they propose and in the same  
8 manner that they propose to give notice? And who's going to  
9 pay for that?

10 MR. STEINBERG: Well, there's a clear reason why we  
11 would not do that, because there's no giving up of any rights.  
12 There's no -- there's nothing that plaintiffs are giving up.  
13 The plaintiffs are going to have their day in court to -- set  
14 to litigate their matter.

15 THE COURT: Well, I don't know. I'm not sure.  
16 That's going to be an issue the Court's going to have to  
17 address as to what notice must be given, and it may be that  
18 Wilmington Trust, as the trustee, is going to be required by  
19 the Court to give notice to every one of the unitholders of a  
20 proposal for the Court to approve a 9019 settlement.

21 And, of course, if they want to make that motion for  
22 approval of the settlement and -- the parties better address  
23 who has to have notice of it. And if they want to make the  
24 motion, they're either going to pay for it or New GM is going  
25 to pay for it.



1 MR. STEINBERG: Well, Your --

2 THE COURT: Okay. And -- well, we'll see. Okay.

3 MR. STEINBERG: But my --

4 THE COURT: So don't think, Mr. Martorana, that by  
5 the fact that you're not going to have to do the notice program  
6 that would have been required by the plaintiffs, that you're  
7 not going to have to do exactly the same thing in order to get  
8 the Court to consider the 9019 motion that you're talking  
9 about.

10 MR. MARTORANA: May I speak, Your Honor?

11 THE COURT: Not yet.

12 MR. MARTORANA: Okay.

13 MR. STEINBERG: Your Honor, so that my comments are  
14 hopefully better put into context, I wasn't criticizing the  
15 plaintiffs for not having a pleading as of today.

16 THE COURT: It sounded that you were.

17 MR. STEINBERG: No, no. Your Honor, I was saying  
18 that we were talking about a discovery program without the  
19 framework of a pleading.

20 THE COURT: Well, you know exactly what the framework  
21 is. There's a fairly voluminous set of papers that they've  
22 presented. You can sit down and you can negotiate. If you  
23 can't -- you can work out the discovery plan, and they'll tell  
24 you what it is they want. And if you're opposing it or you  
25 can't resolve it, you'll be back to me very shortly.



1 I'm assuming that the plaintiffs contemplate making a  
2 motion to enforce what they believe is an enforceable  
3 settlement, so I will have before me at the same hearing two  
4 proposed conflicting settlements. Okay? And an evidentiary  
5 hearing is undoubtedly going to be required. Okay? And I'm  
6 not going to do them separately or seriatim. And if Wilmington  
7 Trust beats the plaintiffs to the punch in making the motion,  
8 that's not going to make a difference because I'm going to  
9 schedule them together, and there's going to be discovery  
10 beforehand.

11 So I'm directing you to meet and confer and try and  
12 agree on a proposed discovery plan. If you can't agree, you're  
13 going to be back to me very shortly and I'll resolve the  
14 differences. I'd also like to know from both sides when they  
15 contemplate filing pleadings in support of their positions, the  
16 9019 that Wilmington Trust wants to present, the -- it's not a  
17 9019 -- well, I guess it is. It's -- you think you have an  
18 enforceable settlement. It'll be presented as a 9019.

19 MR. STEINBERG: I think it was --

20 THE COURT: So I will have competing settlements.

21 MR. STEINBERG: I think, Your Honor, you answered my  
22 question, which was that at some point there needed to be a  
23 pleading --

24 THE COURT: Yes.

25 MR. STEINBERG: -- to tie it into the discovery, and



1 all I was standing and rising is that --

2 THE COURT: Well, I'm not sure, Mr. Steinberg,  
3 because even if they didn't, I think that they'd be entitled to  
4 that same discovery with respect to any 9019 proposal from  
5 Wilmington Trust.

6 MR. STEINBERG: I agree with that. The only question  
7 is, is that if there's going to be an evidentiary hearing as to  
8 whether there was an enforceable agreement with the plaintiffs,  
9 there needed to be a pleading on that. That's not on the  
10 record. And all I was saying is that --

11 THE COURT: Okay. We'll be left with no man's world  
12 with neither settlement being approved, but that's the way  
13 it'll be.

14 MR. STEINBERG: I understand.

15 THE COURT: Okay.

16 MR. STEINBERG: That was the only --

17 THE COURT: But you all -- specifically I am asking  
18 that you need to address who would need to receive notice of  
19 Wilmington Trust's 9019.

20 So let's -- any other issues that need to be  
21 addressed today? Mr. Weisfelner?

22 MR. WEISFELNER: Your Honor, I promise we'll be  
23 quick. I want to get out of here, and I presume Your Honor  
24 would like to do the same. I just find it strange that in  
25 contemplation of discovery on a motion by the plaintiffs to



1 enforce Wilmington's obligations under the settlement  
2 agreement, New GM's counsel stands up to tell you, well, we're  
3 going to take discovery on that because they haven't filed a  
4 motion yet.

5 THE COURT: Well, let's --

6 MR. WEISFELNER: If anyone would have said it --

7 THE COURT: Mr. Weisfelner, I think I've addressed  
8 the discovery issue. I don't need to hear any more.

9 MR. WEISFELNER: You're right. But here's my only  
10 other concern in terms of an orderly procedure where we meet  
11 and confer and do our best as professionals to work out a  
12 consensual arrangement. New GM is already on the record that  
13 any consideration of our settlement, whether compelled under  
14 New York law or otherwise, that New GM insists that that matter  
15 be before Judge Furman, insists they intend to withdraw the  
16 reference.

17 I just point that out because it would be I think  
18 very difficult, if not impossible, to work out a scheduling  
19 motion where the motion to compromise between New GM and the  
20 GUC Trust stays here and the motion to settle, as obligated  
21 under New York law, as threatened by New GM, goes upstairs.

22 THE COURT: Mr. Weisfelner --

23 MR. WEISFELNER: We'll try --

24 THE COURT: Mr. Weisfelner, the filing of a motion to  
25 withdraw the reference does not stay the action before the

1 bankruptcy court. I have always, in every matter before me,  
2 made clear that when a motion to withdraw the reference is  
3 filed, I continue on. The case continues forward. I do not  
4 stay matters because of a motion to withdraw the reference.

5 Judge Furman can do what he believes is appropriate  
6 under the circumstances. What -- and I suspect at an  
7 appropriate time it'll be briefed. The claims allowance  
8 process is so clearly part of the core bankruptcy function.  
9 Okay?

10 MR. WEISFELNER: Thank you, Judge.

11 THE COURT: So what Judge Furman decides is up to  
12 Judge Furman. I am pushing forward. And with either a  
13 litigated motion for leave to file a late class claim or one or  
14 more settlements that might alter that -- I mean, if the  
15 settlement with Wilmington Trust is approved -- if Wilmington  
16 Trust's settlement with New GM is approved, the litigation  
17 still goes forward before me. Okay? It doesn't alter that.  
18 So one way or the other, we're pushing forward. If Judge  
19 Furman wishes to withdraw the reference, if he believes it's  
20 appropriate to do it, he'll do that. But unless and until he  
21 does, we go forward.

22 You know, there have been a few occasions where  
23 literally it was crystal clear because of jury trial demands,  
24 et cetera, there was an absolute right to a jury trial. With  
25 other judges I've just -- you know, we went forward. It was a



1 signed case -- you know, there was a signed pretrial order.  
2 The matter went to the district court, and it's funny that  
3 within a matter of days it settled. Nobody wanted the trial  
4 anymore.

5 But -- so we will push forward and I will resolve  
6 whatever is before me. I read in, you know, I think, Mister --  
7 one of Mr. Steinberg's letters an issue about 157(b)(5). I  
8 don't think that affects estimation, which as I understand was  
9 the approach that the proposed settlement of the plaintiffs  
10 had. We'll see what we get to.

11 First step is what discovery is going to take place.  
12 I want to know, when we meet next, when you're each going to  
13 file pleadings in support of your respective motions. They are  
14 going to be heard together. Anything else anybody wants to  
15 raise today?

16 Mr. Golden?

17 MR. GOLDEN: Just one last thing, Your Honor. I --  
18 it would be helpful to the unitholders, no one else, that we  
19 don't leave today's court session with an absolute certainty  
20 that the New GM/GUC Trust arrangement is actually going to be  
21 signed and finalized. I --

22 THE COURT: I can't effect that, Mr. Golden.

23 MR. GOLDEN: No. I understand that, but I want to  
24 say that the unitholders are optimistic in having further  
25 discussions with its trustee, its fiduciary, to make it clear

1 what the unitholders' position is. So there may be an  
2 eventuality where the proposed New GM/GUC Trust settlement does  
3 not actually go forward.

4 THE COURT: One or the other may not go forward.

5 MR. GOLDEN: Thank you, Your Honor.

6 THE COURT: Okay. We'll take it as it comes, but in  
7 the meantime, I've got to deal with the situation that's  
8 presented to me.

9 MR. GOLDEN: Thank you, Your Honor.

10 THE COURT: We're adjourned.

11 (Proceedings concluded at 4:13 p.m.)

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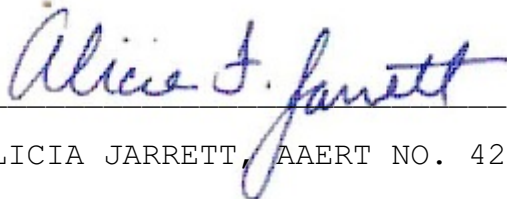
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C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.



ALICIA JARRETT, AAERT NO. 428

DATE: August 20, 2017

ACCESS TRANSCRIPTS, LLC



# Exhibit 2

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg  
. Chapter 11  
. (Jointly administered)  
MOTORS LIQUIDATION COMPANY, .  
Et al., f/k/a GENERAL .  
MOTORS CORP., et al, . One Bowling Green  
. New York, NY 10004  
Debtors. .  
. Wednesday, May 17, 2017  
. 9:04 a.m.  
. . . . .

TRANSCRIPT OF HEARING RE: ORDER TO SHOW CAUSE IN REFERENCE TO  
THRESHOLD ISSUE. (CC: DOC. NO. 13857, 13859, 13861, 13864,  
13865, 13866, 13888, 13889);  
HEARING RE: ORDER TO SHOW CAUSE RE: THE PITTERMAN MATTER.  
(CC: DOC. NO. 13857, 13859, 13861, 13864, 13865,  
13866, 13888, 13889)

**BEFORE THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY COURT JUDGE**

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1 (Proceedings commence at 9:04 a.m.)

2 THE COURT: All right. Please be seated. We're here  
3 in Motors Liquidation Company, 09-50026. Good morning,  
4 everybody.

5 Mr. Weintraub, I think you were up and arguing when  
6 we ended last time.

7 MR. WEINTRAUB: Thank you, Your Honor. Good morning.  
8 William Weintraub of Goodwin Proctor for the Non-Ignition  
9 Switch Post-Closing Accident Plaintiffs. Not quite sure  
10 exactly where I left off last time, Your Honor, so I thought it  
11 would be useful to very briefly recap and then resume.

12 THE COURT: Go ahead.

13 MR. WEINTRAUB: We already discussed, Your Honor, our  
14 view that the four threshold issues set up in the two motions  
15 to enforce of April 2014 and August 2014 did not involve the  
16 post-closing non-ignition switch accident cases. The April  
17 2015 decision of the bankruptcy court established what we call  
18 the due process paradigm for the assertion of independent  
19 claims by requiring a predicate showing of the denial of due  
20 process at the time of the sale in order to assert an  
21 independent claim.

22 We talked about our view of the structure of the  
23 September 3, 2015, scheduling order as being divided into  
24 topics such as punitive damages imputation; bellwether  
25 complaints; the marked second amended consolidated complaint,



1 which was the class action complaint on economic damages; the  
2 California and Arizona complaints; and other complaints where  
3 New GM served a marked pleading and a demand letter setting  
4 forth its position on that particular complaint.

5 Our view is the scheduling order did not mention due  
6 process or independent claims and that New GM's demand letter  
7 exceeded the text authorized in the scheduling order by  
8 confusingly and perhaps misleadingly stating that claims,  
9 except for independent claims, were barred as a result of the  
10 June 2015 judgment. I think an illuminating example of that,  
11 which I didn't discuss last time, was a series of letters  
12 between New GMM and Mr. Tap Turner (phonetic) who is one of the  
13 plaintiffs' lawyers that I represent here and had represented  
14 in the June 2016 hearings. Both of the letters I'm going to  
15 refer to were put into the record by New GM in the compendium  
16 of exhibits that was attached to their motion.

17 We've got a letter which is Document Number 13634-18  
18 that was sent to Mr. Turner on September 1, 2015, right before  
19 the scheduling order issued. And then we have a letter to Mr.  
20 Turner dated May 16, 2016, which is Document Number 13634-21.  
21 In the September letter New General Motors uses the except-for-  
22 independent-claims construct in the letter. And I have a copy  
23 of the letter with me if the Court would like --

24 THE COURT: Sure.

25 MR. WEINTRAUB: -- to see it. I didn't bring a whole





1 bunch of copies, Your Honor. May I approach?

2 THE COURT: Absolutely. Thank you. Give me a chance  
3 to read them before you start again. Okay.

4 MR. WEINTRAUB: Yes, Your Honor. I've given you both  
5 the September one and the May 16.

6 THE COURT: Yes, thank you.

7 (Court reviews documents)

8 THE COURT: Go ahead, Mr. Weintraub.

9 MR. WEINTRAUB: So, Your Honor, my point -- and I'd  
10 call your attention to page 2 --

11 THE COURT: Which letter?

12 MR. WEINTRAUB: -- of the September 1, 2015, letter  
13 at the bottom.

14 THE COURT: I just highlighted it. I just  
15 highlighted it.

16 MR. WEINTRAUB: Okay. So that --

17 THE COURT: Go ahead.

18 MR. WEINTRAUB: In that one, it's the except-for-  
19 independent-claims construct.

20 THE COURT: I highlighted that language.

21 MR. WEINTRAUB: And then in the May 16, 2016, letter  
22 at page 2 of the letter at the bottom of the page the paragraph  
23 reads:

24 "The plaintiff in the lawsuit does not have a claim  
25 based on the ignition switch defect and therefore is



1 prohibited from asserting an independent claim  
2 against New GM."

3 And my point here is that the specificity morphed  
4 from the letter that was sent in connection with the  
5 September 3 or right in advance of the September 3 scheduling  
6 order from the generic except-for-independent-claims to the  
7 more specific, you don't have an ignition switch defect,  
8 therefore, you can't assert --

9 THE COURT: Am I correct that the plaintiffs read the  
10 Second Circuit opinion as interpreting the sale order to carve  
11 out any prohibition on the assertion of independent claims from  
12 whatever defect or source?

13 MR. WEINTRAUB: Yes, Your Honor. It's --

14 THE COURT: That's the position of the plaintiffs.  
15 And that's why you say the May -- your -- what you're  
16 contesting about this May 2016 letter is that, rather, it puts  
17 an additional limit on the independent claims language that you  
18 think is the operative.

19 MR. WEINTRAUB: Well, keep in mind, Your Honor, I  
20 mean, in a global sense, yes. But in terms of the chronology,  
21 in May 2016 the Second Circuit hadn't yet --

22 THE COURT: I understand.

23 MR. WEINTRAUB: -- ruled. Right.

24 THE COURT: I understand --

25 MR. WEINTRAUB: So --



1 THE COURT: -- they haven't ruled yet but --

2 MR. WEINTRAUB: Right. So our position always was  
3 that we didn't think there was subject matter jurisdiction to  
4 bar independent claims, especially prospective independent  
5 claims.

6 THE COURT: Let me ask you this. Whether you agree  
7 with Judge Gerber's decision or not, do you agree that  
8 Judge Gerber expressly barred independent claims -- that he  
9 expressly barred independent claims?

10 MR. WEINTRAUB: I want to make sure I understand your  
11 question.

12 THE COURT: Well, what I'm hear --

13 MR. WEINTRAUB: Well, in the April --

14 THE COURT: Right.

15 MR. WEINTRAUB: In the April 2015 --

16 THE COURT: Yes.

17 MR. WEINTRAUB: -- opinion, I think that what he did  
18 in the April 2015 opinion was that he said the only thing in  
19 front of me right now with respect to a due process violation  
20 are --

21 THE COURT: Is the ignition switch defect.

22 MR. WEINTRAUB: -- are the ignition switch people.  
23 And since he believed that the sale order barred all  
24 independent claims, which we quibble with, but since he  
25 believed that the sale order barred all independent claims, he



1 determined, in the context of the due process briefing, that  
2 had someone been given appropriate notice and come to the sale  
3 hearing and pointed out the over-extension of my jurisdiction,  
4 I would have corrected that and cut that back. The only people  
5 who are here right now are the ignition switch people. So in  
6 essence -- and I think literally what he ruled was that  
7 independent claims for people with an ignition switch defect  
8 are not barred. Everyone else remains stayed by the original  
9 sale order until they demonstrate a due process violation.

10 THE COURT: And I take it, am I correct, that the  
11 position of the plaintiffs, not just of the post -- the  
12 non-ignition switch post-closing plaintiffs, but of all the  
13 plaintiffs is that the Second Circuit interpreted the sale  
14 order as not barring independent claims, full stop?

15 MR. WEINTRAUB: I think the Court did two things. I  
16 think it indicated without ruling that the language of the sale  
17 order was at least debatable as to whether or not it did that.  
18 But then I think that it ruled as a matter of subject matter  
19 jurisdiction that because this wasn't what the Second Circuit  
20 called a "bankruptcy claim," it was claim against a non-debtor,  
21 that you could not sell free and clear of that claim using  
22 363(f), which we view as a subject matter jurisdiction issue.

23 THE COURT: Okay. All right.

24 MR. WEINTRAUB: So, yes, to the --

25 THE COURT: Go ahead.



1 MR. WEINTRAUB: -- the Second Circuit's  
2 interpretation of what the bankruptcy court could do under  
3 363(f). I won't belabor this point. There are other documents  
4 where New GM -- and I think we referred to one of them last  
5 time, Document Number 13390, which was a letter to the  
6 Bankruptcy Court dated August 26th, 2015, in which GM  
7 reiterated its belief that unless you demonstrate a due process  
8 violation, you cannot assert an independent claim. And there  
9 is yet another letter, which is Document Number 13523, which is  
10 a letter --

11 THE COURT: There's no question that New GM is  
12 asserting the position that other than for ignition switch  
13 defect plaintiffs versus the subject vehicles, their position  
14 is that independent claims are barred. I understand that's  
15 their position, and the position of the plaintiffs is no  
16 independent claims are barred.

17 MR. WEINTRAUB: Right. What I'm setting up, Your  
18 Honor, is demonstrating the pivot in position by New General  
19 Motors, that all throughout the fall of 2015 letters to the  
20 bankruptcy court repeatedly emphasized the fact that  
21 independent claims are barred unless and until the due process  
22 violation has been demonstrated. They seem to have abandoned  
23 that position now, but I want to make it very clear that  
24 letters in the record --

25 THE COURT: If I had to review every letter I ever



1 wrote when I was representing usually defendants, sometimes  
2 plaintiffs, you know, it might not necessarily be consistent  
3 with my own view today about whether those positions were  
4 correct or not. So I -- you know, I don't put a lot of stock  
5 in -- I know you're trying to show that their position morphed  
6 over time. I'm much more focused on what Judge Gerber ruled,  
7 what the Second Circuit ruled, what other decisions -- you  
8 know, rather than to a position they may have taken.

9 MR. WEINTRAUB: All right. So then I --

10 THE COURT: Or that you may have taken.

11 MR. WEINTRAUB: I've tried to be consistent. I will,  
12 again, not belabor the point. I think it's in the record. New  
13 GM repeatedly emphasizes the due process paradigm, the quotes  
14 from the decision. And if you look at the -- there was a  
15 ritual footnote that was dropped in many of the letters where  
16 they italicized and bolded the due process part of the  
17 independent claims. I won't belabor that.

18 We discussed last time that -- our view that the  
19 November and December 2015 rulings were not preclusive rulings,  
20 forever barring anyone with a non-ignition switch defect from  
21 asserting an independent claim. We focused, in particular, on  
22 footnote 70. I won't belabor that point. Again, we didn't  
23 view footnote 70 as saying you've timed out, we viewed footnote  
24 70 as saying you haven't done it yet.

25 In its reply brief, one of the things that New GM



1 tries to argue, that it's -- even though there's no reference  
2 or discussion to independent claims in the scheduling order, if  
3 the non-ignition switch post-closing accident plaintiffs had  
4 been enterprising enough to go through the marked version of  
5 the thousand-page master class action complaint, they would  
6 have seen that independent claims were an issue for economic  
7 loss plaintiffs. And we think that that's doubtful.

8 But what we think is not doubtful, again returning to  
9 this theme, if you look at the letter that was submitted to the  
10 bankruptcy court, along with the marked complaint, New GM again  
11 emphasizes the what we call the "due process paradigm." So we  
12 think that this is --

13 THE COURT: Stop, stop, stop. One of the things that  
14 New GM argued in its opening brief at pages 39 and 40 -- I'll  
15 just read from the last sentence on 39:

16 "Designated counsel acknowledged that due process was  
17 an important issue, stating, 'To the extent that that  
18 remains an issue, they would tee up the matter for  
19 prompt determination.'"

20 And the citation is to an August 31, 2015 hearing  
21 transcript at page 81, line 22 to page 82, line 2. And then it  
22 goes on then, "However, they never did that."

23 So one of the questions I asked at the last hearing  
24 that's of concern is whether the non-ignition switch  
25 plaintiffs, by virtue of what their designated counsel said or



1 by something that Judge Gerber said from this language, put the  
2 impetus on the plaintiffs if they believed there was a due  
3 process violation that impacted some, any, or all of the  
4 non-ignition switch defect plaintiffs, that it was incumbent on  
5 them to come forward with it.

6           So this transcript reference is from August. Judge  
7 Gerber, in November, wrote his November decision and entered  
8 the December judgment, and it's a concern to me. And I raised  
9 this last time, that the April and -- April opinion, June  
10 judgment was on stipulated facts. There was, as I understand  
11 it, no evidentiary hearing prior to the November decision and  
12 December judgment.

13           And one of the things I'm focused on is whether the  
14 non-ignition switch defect plaintiffs were on notice that if  
15 they were going to contend that the sale order -- free-and-  
16 clear sale order provisions didn't apply to them, they had to  
17 come forward and show a due process violation. And so Mr.  
18 Steinberg, as I said, at pages 39 and 40 of the opening brief  
19 quotes -- and I don't know who it was who said the words, it's  
20 just a person "designated counsel" -- that knowledge was  
21 important, and to the extent that that remains an issue, they  
22 tee up -- teed the matter up.

23           MR. WEINTRAUB: A couple of responses to that, Your  
24 Honor. I was not the speaker. And I am not designated --

25           THE COURT: Were you here?





1 MR. WEINTRAUB: I was there then, yes. I was not the  
2 speaker. I don't know --

3 THE COURT: Well, whether you're the speaker or  
4 not --

5 MR. WEINTRAUB: Well, I was going to get to that,  
6 Your Honor.

7 THE COURT: Go ahead.

8 MR. WEINTRAUB: I was there for ignition switch  
9 plaintiffs at that time. I have never represented what I'll  
10 call non-ignition switch, colloquial lower case non-ignition  
11 switch plaintiffs before June of 2016. I do not believe and  
12 I've spoken with the co-leads. I do not believe that there are  
13 colloquial non-ignition switch defect cases in the MDL. I  
14 don't think that makes a difference, but the point --

15 THE COURT: Nor do I.

16 MR. WEINTRAUB: Right. But the point is this.  
17 Whatever was said in August of 2015, we had all been -- and  
18 when I say "all," all of the lawyers in this room have been on  
19 the treadmill from May of 2014. Shortly after the August 2015  
20 hearing we had the September 3 scheduling order which, in our  
21 view, didn't set that kind of a deadline. It didn't mention  
22 due process or independent claims. Anyone receiving that order  
23 wasn't alerted to the fact that a bell -- in theory, we don't  
24 think it did -- had gone off, saying here's the September 3  
25 scheduling order, guess what, briefing begins in the middle of



1 this month, briefing will end at the end of this month. That  
2 doesn't give anybody enough time to go and put together that  
3 kind of a case and --

4 THE COURT: Well, whether it gives enough time to put  
5 together the case --

6 MR. WEINTRAUB: They also --

7 THE COURT: -- it wouldn't -- let me finish. I know  
8 I'm a little slow sometimes. Okay. It would not have  
9 prevented the plaintiffs' counsel from adding -- requesting  
10 from Judge Gerber that whether there was a due process  
11 violation affecting non-ignition switch plaintiffs, that the  
12 issue be added to the scheduling order and that we believe  
13 discovery is necessary to do that, et cetera. I mean, just the  
14 way I had every -- all of the lawyers here define the 2016  
15 threshold issues, I think Judge Gerber was -- viewed it as a  
16 collaborative effort by counsel from representing all the  
17 insurance, to make sure that the issues necessary and  
18 appropriate were framed and dealt with.

19 MR. WEINTRAUB: Well --

20 MR. WEISFELNER: Your Honor, might I be heard --

21 THE COURT: Mr. Weisfelner, you'll get your chance.  
22 Okay.

23 MR. WEISFELNER: Okay. Only because I think I was  
24 the speaker.

25 THE COURT: I assumed that.



1 MR. WEISFELNER: That was spoken --

2 THE COURT: I -- you'll get your chance.

3 MR. WEISFELNER: Thank you.

4 MR. WEINTRAUB: Your Honor, again, I think the  
5 answers to that are several. First, that colloquy in court was  
6 not freely available to non-ignition switch post-closing  
7 accident plaintiffs, whether or not they were in the MDL. Of  
8 course, they could have come hunting for that, but most of them  
9 I think would have been completely unaware that this was going  
10 on.

11 In terms of the impetus for the September 3  
12 scheduling order, my recollection, and the reason that it was  
13 on an expedited briefing schedule, is that the bellwether  
14 trials were about to begin in January of 2016.

15 THE COURT: Is a copy of that September 3 scheduling  
16 order -- I got delivered two big binders --

17 MR. WEINTRAUB: I --

18 THE COURT: -- for today's hearing. I'm just  
19 wondering. I'd like to look specifically at it while --

20 MR. WEINTRAUB: It's Document Number 4 in the binder  
21 that I had given at the last hearing.

22 THE COURT: You know, two big fat binders showed up  
23 in my chambers yesterday again. Is it in there or not?

24 MR. DAVIDSON: No, Your Honor. It's from the binders  
25 we handed out at the hearing the last time.



1 THE COURT: Okay. I didn't bring -- I have, you know  
2 (indiscernible). Does somebody have a copy they can hand up to  
3 me?

4 (Counsel confer)

5 THE COURT: Just let me read it.

6 (Court reviews document)

7 THE COURT: Okay. You can have it back, sir.

8 MR. WEINTRAUB: Thank you.

9 THE COURT: I must say the scheduling order would  
10 appear to show the input of the counsel who, you know, on those  
11 issues that were defined -- I give Judge Gerber lots of credit  
12 for writing things, but that looks more like an order that was  
13 tailored, perhaps adjusted by Judge Gerber, but tailored by  
14 counsel.

15 MR. WEINTRAUB: Well, to some degree, yes. For the  
16 people that I was representing, I was very involved in the  
17 things that affected what I was doing. I was much less  
18 involved in things that are the responsibility of others.

19 The point that I was making was that my recollection  
20 was the impetus for the scheduling order, and in particular the  
21 expedited timing, was the fact that the bellwether trials were  
22 beginning in front of Judge Furman. And there were issues on  
23 imputation and punitive damages. And those bellwether trials  
24 were six trials that related to post-closing accidents  
25 involving the ignition switch defect. So the briefing that



1 occurred was on the imputation issue and I think an extensive  
2 breach -- brief was prepared by Brown Rudnick, and then on the  
3 punitive damages issue, which was a brief that we wrote with  
4 respect to the six bellwethers.

5 I don't recall that there was any other briefing on  
6 any other topics. There were marked complaints submitted and  
7 the marked complaints feature into the November decision and  
8 the December judgment as to those particular marked complaints.  
9 A lot of what was addressed in the decision and in the judgment  
10 had to do with perhaps sloppy drafting by some of the pleaders  
11 where they would refer to GM without indicating old or new, or  
12 say something like New GM designed and manufactured the Saturn.  
13 We get all that. And all of that was cleaned up.

14 Our view is that because the due process paradigm was  
15 still in effect, if you look at what Judge --

16 THE COURT: What do you mean, "due process paradigm"?

17 MR. WEINTRAUB: This is the -- you must show a due  
18 process violation in order to assert an independent claim, that  
19 what Judge Gerber did in the decision and what Judge Gerber did  
20 in the judgment was that ignition switch defect-related  
21 independent claims by and large pass through what we call the  
22 "bankruptcy gate," and independent claims for non-ignition  
23 switch did not pass through the gate. We believe they did not  
24 --

25 THE COURT: They continued to be -- I think what your



1 side's brief acknowledged is that the non-ignition switch  
2 plaintiffs' claims remain stayed.

3 MR. WEINTRAUB: Yes. Not barred, not --

4 THE COURT: They remained --

5 MR. WEINTRAUB: -- dismissed forever.

6 THE COURT: -- remain stayed.

7 MR. WEINTRAUB: Right. So I think, given the timing  
8 -- and don't forget we were -- you know, we had gone from the  
9 briefing that led to the April and June decision to this whole  
10 procedure on stay/no stay pleadings, extensive letters, and  
11 briefing back and forth on the form of the judgment. Then we  
12 that took us up to September, a September 3 scheduling order.  
13 Then we were addressing punitive damages and imputation on a  
14 curtailed briefing schedule.

15 So my point is, Your Honor, that if there was a time,  
16 and maybe there should've been a time, to address due process  
17 with respect to non-ignition switch post-closing accidents, and  
18 I'm using that in the lower case term, that was not the time  
19 because that would have required extensive discovery of  
20 multiple defects; not just recalls, but defects for which there  
21 were not recalls. And although it was not -- I wasn't  
22 representing any of these people, I could see with the benefit  
23 of hindsight why nobody said, hey, this would be a good time to  
24 let's open it up for all discovery on all independent claims.  
25 It just wasn't the right time, Your Honor, given the treadmill



1 we were on and the time constraints. So I think that to  
2 retroactively say, oh, that was the time, you're all out now,  
3 would be manifestly unfair.

4 THE COURT: Why don't we wait another ten years and  
5 see what, you know, maybe somebody -- there was some other  
6 defect.

7 MR. WEINTRAUB: Obviously, we're not waiting another  
8 ten years. We're here now. But I think the more important  
9 point is during this period of time where the November,  
10 December opinion were operative, and we don't think had told  
11 people it's too late to make your due process argument in order  
12 to assert an independent claim, the supervening event occurred,  
13 which was the Second Circuit, which we think made the  
14 requirement of showing a due process violation in order to  
15 assert an independent claim an obsolete concept. And we think  
16 that the Second Circuit opinion basically covers the waterfront  
17 on independent claims in terms of your ability or the ability  
18 of a plaintiff to seek to assert it. It doesn't determine that  
19 independent claims are good. That's for the trial court.

20 But in terms of asserting the independent claim, we  
21 think that the Second Circuit which vacated it, the decision,  
22 and remanded it to you for determination with respect to  
23 non-ignition switch plaintiffs to make a ruling consistent with  
24 the determination of the Second Circuit.

25 THE COURT: Go ahead.



1 MR. WEINTRAUB: Okay. So, Your Honor, I think I'm  
2 now back to where I was before. So back on April 20th I  
3 referred to New GM's recent pivot of position about the  
4 September scheduling order. In its reply brief New GM says,  
5 for the first time, that the focus of the fall briefing was the  
6 requirement that plaintiffs who wanted to assert independent  
7 claims had to prove up their claims or be forever barred.

8 Despite all the contemporaneous correspondence from  
9 New GM to the Court and others that adhered to what we call the  
10 April 2015 due process paradigm for independent claims, and  
11 despite the fact the Second Circuit had not yet ruled, New GM  
12 seems to be arguing that Judge Gerber and New GM silently  
13 changed the existing rules of the game as they then existed,  
14 and that independent claims for everyone and every defect were  
15 permitted. And they seem to be taking this position even  
16 before the Second Circuit ruled. New GM flat out says in its  
17 letter to this Court on Tronox that independent claims were  
18 always good, which we think is not what actually happened back  
19 in 2015. We think, Your Honor, that --

20 THE COURT: I think -- this is an aside. I think  
21 we'll be scheduling another hearing to deal with the Tronox  
22 issues, but we're not doing that now.

23 MR. WEINTRAUB: I'm sorry?

24 THE COURT: We're going to schedule -- I'm going to  
25 schedule a separate hearing to deal with the Tronox arguments.





1 That's not going to be today.

2 MR. WEINTRAUB: Okay. I was prepared to do --

3 THE COURT: I'm not. I don't want to hear any  
4 argument about Tronox today.

5 MR. WEINTRAUB: And you've saved everybody's lunch,  
6 Your Honor. I had a lot about Tronox.

7 THE COURT: I'm not -- and the reason being, Mr.  
8 Weintraub, that I don't feel that I'm prepared fully to deal  
9 with the Tronox issues because, in addition, I've read -- I  
10 read Tronox when it came down, not because of this case. I  
11 read Tronox as soon as it came down. But I haven't read the  
12 Third Circuit cases and which argue -- it's argued that Tronox  
13 has adopted the Third Circuit view and -- anyway. So that's  
14 going to be a separate argument. I'm not prepared to deal with  
15 that today.

16 MR. WEINTRAUB: At the risk of having something  
17 thrown at me, what I would like to do, Your Honor, if there's  
18 going to be a further hearing on Tronox, is to submit a short  
19 letter brief.

20 THE COURT: We'll talk about it at the end of this  
21 hearing.

22 MR. WEINTRAUB: Okay.

23 THE COURT: Okay. I'll -- I don't want to divert us.  
24 I'm just letting everybody know.

25 MR. WEINTRAUB: Okay.



1 THE COURT: I'm not listening to Tronox arguments  
2 today.

3 MR. WEINTRAUB: So in effect, Your Honor, given this  
4 pivot of position, we think that GM is speaking out of both  
5 sides of its mouth. If, as GM has consistently argued, there  
6 are no independent claims other than for plaintiffs with an  
7 ignition-switch-related claim, then New GM is still clinging to  
8 the discredited notion that there are only two categories of  
9 claims, assumed liabilities and retained liabilities, unless  
10 the claimant can prove a due process violation.

11 Nothing in the November and December 2015 rulings  
12 says that the due process ability had timed out. And we  
13 believe that New GM's original position fails because First and  
14 Second Circuit, as I said, rejected the due process paradigm  
15 set forth in the April 2015 decision. And second, the December  
16 2015 scheduling order we don't believe properly set up the due  
17 process issues for adjudication. And third, we don't think  
18 that there was any adverse adjudication on the due process  
19 issues that came out of the November and December rulings.

20 If, however, as a result of the pivot, New GM is now  
21 trying to argue the marked pleading process heralded the need  
22 for every plaintiff to defend the merits of its independent  
23 claims in the fall of 2015, no order of the Court says that.  
24 The notion that representative complaints were adequate to bind  
25 parties that were not served with a marked version of their own



1 complaint --

2 THE COURT: Do you agree that independent claims  
3 cannot be based or predicated upon conduct of Old GM?

4 MR. WEINTRAUB: I do, with a caveat. And the caveat  
5 is obviously these independent claims relate to defective  
6 vehicles manufactured by Old GM. And both --

7 THE COURT: Other than that --

8 MR. WEINTRAUB: Right.

9 THE COURT: -- can the conduct of Old GM --

10 MR. WEINTRAUB: No.

11 THE COURT: -- any part of the basis for independent  
12 claims?

13 MR. WEINTRAUB: No. So the failure to warn, the  
14 fraudulent --

15 THE COURT: Right.

16 MR. WEINTRAUB: -- all of that is on New GM. But as  
17 I said, and as Judge Gerber and Judge Furman both acknowledged,  
18 the root -- it has to deal with a vehicle manufactured by Old  
19 GM.

20 The notion that representative complaints were  
21 adequate to bind parties not served with a marked version of  
22 their own complaint simply doesn't hold water, given the  
23 differences between each complaint, the different flavors of  
24 independent claims that could be asserted by the scores of  
25 individual plaintiffs' lawyers who assert -- asserting



1 independent claims --

2 THE COURT: You don't think it makes any difference  
3 if Judge Gerber determined that particular language in a  
4 representative complaint could not be asserted, that when --  
5 that that doesn't bind the next case, that the complaint has  
6 the precise identical language?

7 MR. WEINTRAUB: Oh --

8 THE COURT: I'm just using an example.

9 MR. WEINTRAUB: -- I acknowledge that. And I think I  
10 acknowledged that earlier when I said that, you know,  
11 complaints that were sloppy and didn't differentiate between  
12 Old and New or said that New GM manufactured the Saturn, I --  
13 we don't quibble with that.

14 THE COURT: I think I said at the last hearing, for  
15 better or worse, as Judge Bernstein continues to do in Old  
16 Carco and as Judge Gerber was doing in Motors Liquidation, I do  
17 believe it's the appropriate role of the bankruptcy court to  
18 scrutinize the pleadings, if they're properly presented, to  
19 determine whether particular allegations are or are not  
20 permissible. Not something I relish doing. Hopefully it won't  
21 come up very often but --

22 MR. WEINTRAUB: And, yeah, we don't quite agree with  
23 that, Your Honor. But I understand --

24 THE COURT: So be it.

25 MR. WEINTRAUB: So be it. But my point is that



1 representative complaints with respect to something other than  
2 sloppy language do not direct --

3 THE COURT: Sloppy language in your eyes is probably  
4 not sloppy language in the eyes of New GM. But we don't need  
5 to quibble about that today.

6 MR. WEINTRAUB: No, I understand. But my point would  
7 be, more specifically, that failure to warn in one state may be  
8 different than failure to warn in another state. That goes to  
9 the merits which is something that the trial court should  
10 address. I don't think that what you're -- Judge Gerber did  
11 was say a non-ignition switch failure to warn, you can't assert  
12 that because there's no such cause of action that you can  
13 assert. I think that anything that was barred or continued to  
14 be stayed under the November and December rulings was because  
15 of the due process predicate that was at that point the law of  
16 the case and not because of the merits of the claims.

17 And it -- so we don't think that anyone that was not  
18 served with a marked version of their own complaint which  
19 highlighted something about their independent claim should be  
20 barred because some other representative complaint was  
21 continued to be stayed.

22 THE COURT: That may be the case, Mr. Weintraub. But  
23 if somebody actually comes -- if New GM makes a motion with  
24 respect to some new state court complaint that includes  
25 language that Judge Gerber expressly struck want to know what's



1 going to happen.

2 MR. WEINTRAUB: I think I know what's going to  
3 happen.

4 THE COURT: Okay.

5 MR. WEINTRAUB: But --

6 THE COURT: So I think your statement went too far.  
7 It may not have preclusive effect as if they were here before  
8 -- those parties were here before. But unless there's  
9 something in the Second Circuit opinion that would say that  
10 what Judge Gerber did was erroneous with respect to striking  
11 language from pleadings, it's like almost a certainty the same  
12 result occurs again. Changing a few words here or there is  
13 probably not going to be the decider. Go ahead.

14 MR. WEINTRAUB: Well, the Second Circuit didn't  
15 address any of that --

16 THE COURT: I understand.

17 MR. WEINTRAUB: -- because that wasn't up on appeal  
18 at that time so --

19 THE COURT: I'm not writing on a clean slate when I  
20 write.

21 MR. WEINTRAUB: No, I understand. My point, Your  
22 Honor, is that we don't believe that the September 3 scheduling  
23 order told people if you don't show up with your independent  
24 claim so that Judge Gerber can go thumbs up or thumbs down,  
25 you're out forever. Now it may be, and I don't disagree, that



1 New GM can bring somebody into this Court now and say this  
2 should be thumbs down on this independent claim for this  
3 reason, but at that point that plaintiff will know what's going  
4 on. And that plaintiff will be able to present its position to  
5 you and --

6 THE COURT: And I'm sure that Mr. Steinberg will do  
7 what he's done with many of these others. He writes letters to  
8 people and he tells them what prior rulings were and why  
9 particular language in a complaint is contrary to the prior  
10 rulings. And hopefully, more often than not, the plaintiffs  
11 amend their pleading to take out the offending language and the  
12 case goes off and proceeds. And that's -- I think that's  
13 happened quite a bit.

14 MR. WEINTRAUB: And again, and I don't think we're  
15 dancing around semantics, but I just want to be clear. I'm not  
16 talking about offending language. And when I say "offending  
17 language," it's the categories of things that I --

18 THE COURT: Yeah, you call it sloppy and --

19 MR. WEINTRAUB: Right.

20 THE COURT: -- New GM doesn't call it sloppy.

21 MR. WEINTRAUB: But I think there's a difference  
22 between language and a cause of action. And if the complaint  
23 raises a cause of action that plaintiff should have the  
24 opportunity to come into this Court and say this is a valid  
25 cause of action, it's a valid independent claim.



1 THE COURT: And they're basing the cause of action on  
2 conduct of Old GM. It's not an independent claim.

3 MR. WEINTRAUB: I agree. When I say "independent  
4 claim" I mean independent claim --

5 THE COURT: Right.

6 MR. WEINTRAUB: -- in terms of the definition that  
7 you and I are using.

8 THE COURT: Go ahead.

9 MR. WEINTRAUB: So in sum, Your Honor, turning back  
10 to the four threshold issues briefing, for the reasons stated  
11 in our briefs for the non-ignition switch post-closing accident  
12 plaintiffs, none of the principles of res judicata, law of the  
13 case, or failure to appeal are applicable to bar the  
14 independent claims of these post-closing accident plaintiffs.  
15 The first two motions to enforce did not apply to non-ignition  
16 switch post-closing accident plaintiffs and they were not filed  
17 against those parties. The non-ignition switch post-closing  
18 accident plaintiffs were not parties to the four threshold  
19 issues briefing. The non-ignition switch post-closing accident  
20 plaintiffs did not participate in the four threshold issues  
21 briefing. There was no designated counsel for the non-ignition  
22 switch post-closing accident plaintiffs in connection with the  
23 four threshold issues briefing. And we don't believe there  
24 were any adverse determinations made against the rights of non  
25 ignition switch post-closing accident plaintiffs with respect





1 to their accidents.

2 THE COURT: Can you give me examples, not exhaustive,  
3 but can you give me examples of allegations that post-closing-  
4 act plaintiffs have alleged as a basis for independent claims  
5 against New GM?

6 MR. WEINTRAUB: Failure to warn. You knew that this  
7 vehicle was defective, you didn't warn me, and I ended up  
8 having an accident, and I was injured. Had you warned me, I  
9 wouldn't have had the accident. Had you recalled the vehicle  
10 and repaired it, I wouldn't have had the accident. I think  
11 that those are the species of claims.

12 I'm not a personal injury lawyer so I don't know all  
13 the ins and outs of other things that people could allege. I  
14 know that there are some fraud claims alleged which I think are  
15 a species of, I was misled into thinking my vehicle was safe.  
16 But again I -- I'm not capable of being exhaustive as I stand  
17 here today.

18 THE COURT: Okay.

19 MR. WEINTRAUB: As I was saying, Your Honor, there  
20 were no adverse determinations made against the rights of  
21 non-ignition switch post-closing accident plaintiffs as to  
22 their accidents, other than perhaps that their claims were  
23 implicitly deferred because of the due process issue. So  
24 clearly, Your Honor, we believe that the absence of a motion to  
25 enforce as to the non-ignition switch post-closing accident



1 plaintiffs, the lack of notice to them and the due-process-  
2 related findings made concerning only the ignition switch  
3 defect and subject vehicles, that none of the April and June  
4 rulings were binding on these claimants and no order was  
5 entered on the threshold issues that these claimants were  
6 compelled to appeal from.

7 THE COURT: Your position I think, very simply, is  
8 that the issue of due process, of any due process violation  
9 really isn't relevant to whether the non-ignition switch  
10 plaintiffs can assert independent claims against New GM.

11 MR. WEINTRAUB: That -- that's correct with one --  
12 there's always a little caveat. As you know, we contend that  
13 as future claimants they cannot be barred by the sale orders  
14 restriction on successor liability. I'll get to that when I  
15 get to issue four. You know, there is a latent due process  
16 issue there, but a different due process --

17 THE COURT: That's a successor liability claim --

18 MR. WEINTRAUB: Right.

19 THE COURT: -- and not -- not a --

20 MR. WEINTRAUB: Exactly.

21 THE COURT: -- independent claim. With respect to  
22 the independent claim --

23 MR. WEINTRAUB: Right.

24 THE COURT: -- your view is that due process isn't --  
25 finding a due process violation is not a necessary predicate to



1 any plaintiff, specifically your group of plaintiffs asserting  
2 independent claims against New GM?

3 MR. WEINTRAUB: That's correct, Your Honor. Now  
4 turning to the fall 2015 briefing under the September 2015  
5 scheduling order, for the reasons stated in our briefs for the  
6 non-ignition switch post-closing accident plaintiffs, again, we  
7 don't believe that the principles of res judicata, law of the  
8 case, or failure to appeal are applicable to their independent  
9 claims. The scheduling order did not effectively notify the  
10 non-ignition switch post-closing accident plaintiffs that their  
11 independent claims were under attack or that they had barely  
12 three weeks to demonstrate a due process violation or come into  
13 court.

14 THE COURT: So in a letter to the Court,  
15 Mr. Steinberg, in correcting statements that were made at the  
16 last hearing, pointed to the involvement, participation,  
17 attendance at hearings, of lawyers in representing clients with  
18 non-ignition switch plaintiffs. I guess the view from your  
19 side of the courtroom is that appearance at hearings,  
20 participation in hearings is not enough. What's important is  
21 whether the Court was presented with the issues and decided the  
22 issues.

23 MR. WEINTRAUB: That's correct, Your Honor. I would  
24 also quibble with the notion that non-ignition switch  
25 post-closing accident plaintiffs were involved in these



1 proceedings. I don't believe that they were.

2 THE COURT: Okay.

3 MR. WEINTRAUB: I certainly wasn't representing them.  
4 Mr. Weisfelner only represents economic loss plaintiffs. You  
5 know, what was going on here, to borrow a phrase, was sort of  
6 bankruptcy inside baseball, on very specific issues.

7 THE COURT: It should be no surprise. I mean I --  
8 what's important to me -- I -- you know, frequently in some big  
9 cases I get a courtroom full of lawyers representing lots of  
10 different stakeholders and different interests. What I focus  
11 on is what are the issues presented to me and what did I  
12 decide.

13 MR. WEINTRAUB: Uh-huh.

14 THE COURT: The fact that there may have been lawyers  
15 with a totally -- you know, on a different issue, would take  
16 entirely different positions, I -- you know, what was the  
17 evidence before me, what were the arguments presented, and what  
18 did I decide, not who was in the courtroom and who they may  
19 have represented.

20 MR. WEINTRAUB: I concur, Your Honor. So continuing,  
21 just without repeating but summing up, we don't think that the  
22 September 3 scheduling order notified people either of a due  
23 process deadline or of a show-up-with-your-complaint-and-get-a-  
24 thumbs-up-or-thumbs-down deadline. That's simply just not in  
25 the order and it's clearly not baked into the time periods that



1 we were operating under.

2 THE COURT: That's all well and good, but I -- I'm  
3 going to expect to hear from both sides about that August  
4 transcript where Judge Gerber was told that the issues would be  
5 teed up. Judge Gerber didn't draft the September scheduling  
6 order on his own, counsel were heavily involved in doing it.  
7 Yes, he signed an order. Yes, I signed the order for the order  
8 to show cause on the 2016 threshold issues. But it was counsel  
9 who defined the issues that they believed had to be decided and  
10 I agreed I would address.

11 And so I have this question. That August transcript  
12 certainly appears to show recognition by counsel that if that  
13 the due process issue is important, and we'll tee it up soon if  
14 that's appropriate. And of course, it wasn't. Your position  
15 is the September scheduling order, the November decision, and  
16 the December judgment don't -- your position is they don't  
17 expressly deal with it. New GM may have a different view about  
18 it.

19 But so, you know, I think one of the things I have to  
20 decide is whether, based on what was said, maybe more than just  
21 the August hearing, but certainly from that transcript of the  
22 August hearing, was the failure to raise that issue, schedule  
23 it for hearing and argument, if counsel believed they needed  
24 discovery, put that on the table right then. It -- you know,  
25 sometimes it's time to fish or cut bait. Okay. That's what



1 I'm -- one of the things. And I -- you may not be the one to  
2 have to address that. But I'll let others --

3 MR. WEINTRAUB: Well, but I need to address it  
4 because now I represent those people. I didn't back then.

5 THE COURT: So go ahead.

6 MR. WEINTRAUB: So the way I would address it, Your  
7 Honor, is there's a difference between what was talked about,  
8 and I won't deny because it's in the transcript, that it was  
9 talked about. The issue is did it find its way into the order.

10 THE COURT: Well, why is that the issue? If -- I --  
11 there's where I beg to differ with you, Mr. Weintraub. Where  
12 counsel acknowledges at the August hearing that due process is  
13 important and we'll tee it up soon if it needs to be addressed,  
14 and then counsel negotiate a scheduling order and don't  
15 identify the issue, why shouldn't the Court, me, conclude that  
16 counsel made an affirmative decision not to challenge due  
17 process with respect to non-ignition switch defects, and they  
18 had their chance; they didn't do it and it's too late, in 2017,  
19 to do it.

20 MR. WEINTRAUB: The answer to that, Your Honor, is if  
21 General Motors thought it should have been in there, they  
22 could've raised it. If Judge Gerber -- let me -- please let me  
23 -- if Judge Gerber thought it should have been in there, he  
24 could have raised it. And whatever happened in the bankruptcy  
25 court, what the non-ignition switch plaintiffs received was



1 that scheduling order. That scheduling order did not tell them  
2 now is the time to address due process issues. And it would be  
3 manifestly unfair and a violation of due process to say, guess  
4 what, something that wasn't in the order was discussed at a  
5 hearing that you weren't at, and even though you got the order  
6 and it wasn't in the order, you're now barred forever. That  
7 would be an egregious violation of due process, Your Honor.

8           The second answer to that question is,  
9 notwithstanding everything that you said about the August  
10 hearing, Judge Gerber did not rule in the November decision  
11 that people had timed out on due process. That's not how I  
12 read footnote 70. That's not how I read the December opinion.  
13 So if Judge Gerber felt that someone had stumbled, he did not  
14 say it in the opinion. It could -- it would have been very  
15 easy to say all non-ignition switch plaintiffs are now barred  
16 because they had their opportunity and they did not. And  
17 frankly, had he said that, someone would have appealed that.  
18 But he didn't say that and you cannot basically read something  
19 into the scheduling order and into the November/December  
20 rulings that's just not there, especially to bind people who  
21 weren't even in any of these proceedings at that time.

22           THE COURT: Well, your view -- I think I'm correct in  
23 this. Your view is that non-ignition switch post-closing act  
24 -- accident plaintiffs are future claimants and they can't be  
25 bound anyway.



1 MR. WEINTRAUB: That's true.

2 THE COURT: So --

3 MR. WEINTRAUB: And my --

4 THE COURT: -- it's not really your issue. Is it? I  
5 mean --

6 MR. WEINTRAUB: Well, I've raised it. It's --

7 THE COURT: I know you're arguing it --

8 MR. WEINTRAUB: Yes.

9 THE COURT: -- but your main point is that they're  
10 future claimants and they're not barred.

11 MR. WEINTRAUB: Right. So --

12 THE COURT: Okay.

13 MR. WEINTRAUB: -- but I also have the Second Circuit  
14 opinion which I think renders obsolete the due process paradigm  
15 which says the bankruptcy court didn't have subject matter  
16 jurisdiction to bar independent claims.

17 THE COURT: Yes, I understand that.

18 MR. WEINTRAUB: And, you know, just to put a little  
19 bit of a finer point on it, and it may have been a point I made  
20 last time or in my brief. This is not the traditional third-  
21 party release-type issue because when you have a third-party  
22 release, those claims already exist. And the third party who  
23 is being compelled to give the release has notice and an  
24 opportunity to say, wait a minute, I have a good claim, don't  
25 release the claim, or doesn't meet the Master Mortgage factors





1 or the -- I forget the Second Circuit factors in, and I should  
2 know this -- but doesn't meet the factors. That's not what  
3 happened here. New GM wasn't even operating yet. Nobody had  
4 had their accidents yet. So this is completely a future claim  
5 issue.

6 THE COURT: So your view is I don't have to reach  
7 this issue with respect to your clients? Well, I say "this  
8 issue." I don't have to reach the issue of whether they did or  
9 didn't have a due process violation. Your position is very  
10 simple, that they're future claimants, they can't be bound.  
11 Right?

12 MR. WEINTRAUB: Yes.

13 THE COURT: Okay.

14 MR. WEINTRAUB: But also the other -- the subject  
15 matter jurisdiction issue as well. One of the things that New  
16 General Motors argues is that there's no difference between a  
17 scheduling order and an order to show cause, and that my  
18 acceptance of an order to show cause somehow means the  
19 scheduling order was sufficient. Now we've already talked  
20 about the contents of the scheduling order and now I want to  
21 talk about the differences between a scheduling order and an  
22 order to show cause, and this scheduling order in particular  
23 and your order to show cause in particular.

24 First, Your Honor, my view is that as a generic  
25 matter a scheduling order tells people that are already parties



1 to a proceeding when something is going to happen. A  
2 scheduling order, in my view, doesn't create its own  
3 jurisdiction. And an order to show cause, on the other hand,  
4 is what I would characterize as a brick through the window, in  
5 the sense that order to show cause is if you don't show up and  
6 show cause you could be held in contempt. That tends to get  
7 people's attentions.

8           Second, Your Honor, when I agreed to the scheduling  
9 order in September of 2015, as I had said earlier, I had been  
10 retained to address a specific question for specific clients  
11 with respect to the upcoming trials in the MDL. I was briefing  
12 punitive damages for the bellwethers because that's what  
13 Judge Furman asked Judge Gerber about, and asked it I think  
14 somewhat urgently because of the upcoming trial.

15           In connection with the scheduling order, I knew  
16 exactly what proceeding I was in for my clients and what I was  
17 supposed to be doing. I was in a pretrial proceeding that had  
18 been instigated by Judge Furman. I did not agree to any other  
19 matters for anyone else. I was focused on my bellwether  
20 post-closing accident trials, period. Nor did I read the  
21 scheduling order the way that New GM would now like to read the  
22 scheduling order.

23           The non-ignition switch post-closing accident  
24 plaintiffs' issues were not, so far as I knew back then and so  
25 far as I know right now, were not an issue in the MDL. And



1 again, I'm talking about colloquial non-ignition switch. I do  
2 recognize and I conceded and I apologized to the Court. I  
3 didn't mean to speak loosely and use the technical term, I was  
4 using the colloquial term. I am well aware that there are many  
5 vehicles other than the recall that was the subject vehicles  
6 where you've got that rotation problem and the loss of power  
7 and brakes and airbags. And that's all being litigated in the  
8 MDL and there has been discovery on that.

9           Again, I'm not trying to be pejorative but I think,  
10 you know, the Court sort of indicated that, you know, myself  
11 and Mr. Weisfelner, you know, you're here every day, you're  
12 imbued with these issues, you know, why don't you say  
13 something? And I think the short answer is, if I had though,  
14 Your Honor, even though that I was not representing any of  
15 these plaintiffs, that there was something in that scheduling  
16 order that basically set off a bell that said you have through,  
17 you know, the end of this month or the end of next month to  
18 demonstrate a due-process violation or your claims will be  
19 barred. I would have said something.

20           I would have tinkered with that order to say this  
21 order is not clear. It's got to be made clear. I would have  
22 suggested that those parties organize. I know this all sounds  
23 like 20/20 hindsight, but nobody saw this issue, Your Honor.  
24 It wasn't raised by GM. It wasn't raised by Judge Gerber. It  
25 wasn't raised by Mr. Weisfelner. The scheduling order was what



1 it was, and I don't think it notified people.

2 THE COURT: Can I ask this: The clients who you do  
3 represent --

4 MR. WEINTRAUB: The ones now?

5 THE COURT: Yes.

6 MR. WEINTRAUB: Yes.

7 THE COURT: -- are all of their vehicles -- at some  
8 point, did all of that make and model year become subject to a  
9 recall?

10 MR. WEINTRAUB: I don't think so, Your Honor. I  
11 don't know particularly with respect to recalls. I know that  
12 Mr. Turner and Mr. Butler are not part of the MDL, that they  
13 don't have ignition-switch, upper case or lower case issues. I  
14 know that Denny -- Denny's client is a rollover case.

15 It's not an ignition-switch case, however, that one  
16 was brought into the MDL, I think counsel would say against  
17 their wishes, in March of 2016, after all of this briefing,  
18 because one of the elements in the wrecked vehicle indicated a  
19 rotation, but I will tell you counsel does not consider it to  
20 be an MDL case, and it does not consider it to be an ignition-  
21 switch case. So --

22 THE COURT: So I think I have -- maybe you can tell  
23 me. It does not appear to me that there is any dispute among  
24 the counsel who are here as to what an ignition switch, all  
25 capital -- or initial capital, independent of what is an



1 ignition-switch defect? Am I right in that?

2 MR. WEINTRAUB: That's right, but, again, our crazy  
3 nomenclature would be that non-ignition-switch defects  
4 include --

5 THE COURT: Just a second. Let's take that one at a  
6 time.

7 MR. WEINTRAUB: Yes.

8 THE COURT: There does not appear to be any dispute  
9 as to what is an initial caps ignition-switch defect.

10 MR. WEINTRAUB: Correct.

11 THE COURT: And it relates to subject vehicles?

12 MR. WEINTRAUB: Correct.

13 THE COURT: All right. I am quite confused about  
14 what the range of alleged defects may be for non-ignition-  
15 switch defects.

16 MR. WEINTRAUB: I can --

17 THE COURT: I know that some of them are ignition-  
18 switch related, and that --

19 MR. WEINTRAUB: I can answer the question in a simple  
20 way, but it's -- it --

21 THE COURT: Okay. Let's just -- let me --

22 MR. WEINTRAUB: -- covers a lot of ground.

23 THE COURT: -- look through my notes. Hold on.

24 MR. WEINTRAUB: Maybe I can sit down.

25 THE COURT: You know, in the summer of 2014, there



1 were some additional recalls that related to ignition switches,  
2 and -- but those, for purposes of these proceedings, have been  
3 included within the non-ignition-switch --

4 MR. WEINTRAUB: Exactly.

5 THE COURT: -- defects.

6 MR. WEINTRAUB: Right.

7 THE COURT: Even though they're ignition-switch  
8 related --

9 MR. WEINTRAUB: Right.

10 THE COURT: -- they weren't in the first three  
11 recalls.

12 MR. WEINTRAUB: So non-ignition-switch defect, under  
13 the unfortunate terminology that we've all adopted, is anything  
14 other than an ignition-switch defect. And an ignition-switch  
15 defect --

16 THE COURT: (Indiscernible)

17 MR. WEINTRAUB: -- is a very specific defect of very  
18 specific vehicles. So there are lower case ignition-switch  
19 cases that fall into the category of non-ignition switch,  
20 right. And, Your Honor, Turner and Butler, those cars were not  
21 recalled. Those were not subject to recalls. There has been  
22 some discovery in the MDL on defects that are not ignition-  
23 switch related, lower case ignition switch. My understand --

24 THE COURT: But I find no basis in the Second Circuit  
25 opinion to sort of open the floodgates or the doors to



1 successor liability claims. Anytime somebody comes forward and  
2 says, my car manufactured by Old GM had a defect, not an  
3 initial caps ignition-switch defect, but some other problem,  
4 and I am entitled to assert successor liability claims. As the  
5 record stands now, the sale order bars them, and I don't see  
6 anything in the Second Circuit opinion or anything else that  
7 alters that fact. Do you agree or disagree?

8 MR. WEINTRAUB: I'm not sure I follow you. Are you  
9 talking about people who had had accidents before the -- or  
10 after?

11 THE COURT: I missed the before what?

12 MR. WEINTRAUB: Before the closing of the sale, or  
13 after the closing of the sale?

14 THE COURT: New GM assumed liability for post-closing  
15 accidents.

16 MR. WEINTRAUB: Right.

17 THE COURT: And it's not tied to whether there was a  
18 recall or not.

19 MR. WEINTRAUB: Right.

20 THE COURT: So --

21 MR. WEINTRAUB: Well, this is our --

22 THE COURT: I'm not including -- I mean, there are  
23 assumed liabilities. Nobody is disputing assumed liabilities.  
24 They may be disputing whether punitive damages are available --

25 MR. WEINTRAUB: Right.



1 THE COURT: -- for assumed liability, but nobody is  
2 disputing that New GM assumed liability for post-closing  
3 accident --

4 MR. WEINTRAUB: Right.

5 THE COURT: -- plaintiffs, whatever, if they can show  
6 there was a defect in their car. That's correct, isn't it?

7 MR. WEINTRAUB: That's correct. However, assumed  
8 liability is limited to how the purchase agreement defines  
9 product liabilities. So the argument is on the successor  
10 liability issue that those people, as future claimants,  
11 shouldn't be barred by an artificial curtailment of what  
12 liabilities would be.

13 THE COURT: Well, that's where I can't -- you know,  
14 you're going to tell me that somebody ten years from now is  
15 going to come in and say, oh, there was a problem with the  
16 connecting rods, and I've got an expert that's going to say  
17 that was a defect in the vehicle and it caused my car to go out  
18 of control and hit a wall and I was injured, and so, I have a  
19 successor liability claim against New GM. I mean, I don't read  
20 the Second Circuit as opening that door, and I don't see any  
21 basis to do anything other than keep that door shut.

22 MR. WEINTRAUB: I don't believe that the Second  
23 Circuit shut that door. I think that what the Second Circuit  
24 said is, it's an open question in this Circuit as to whether  
25 you can sell free and clear of future claims. And then we rely





1 on Grumman Olson, which says --

2 THE COURT: Yes. I'm very familiar with Grumman  
3 Olson.

4 MR. WEINTRAUB: Okay.

5 THE COURT: Both Judge Gerstein's decision and the  
6 district court's decision.

7 MR. WEINTRAUB: So that's the essence of our issue  
8 four.

9 THE COURT: Okay. All right.

10 MR. WEINTRAUB: So I'm not quite finished with  
11 issue --

12 THE COURT: Oh, no.

13 MR. WEINTRAUB: -- two, but it sounds like I'll be  
14 brief on issue four.

15 THE COURT: Yes.

16 MR. WEINTRAUB: So based upon -- we were talking  
17 about this during the scheduling order and the order to show  
18 cause, so based on my view of the difference between a  
19 scheduling order and an order to show cause, I agreed to the  
20 order to show cause in this process here, but my argument and  
21 my agreement was not just based on the different labels. This  
22 time, it was clear who the target --

23 THE COURT: Who is the other plaintiffs' counsel that  
24 just agree to remain silent and not -- we're not going to raise  
25 that due-process issue now if we can come back in a few years



1 and raise it then?

2 MR. WEINTRAUB: Well, you're assuming that the non-  
3 ignition switch, post-closing accident plaintiffs were aware of  
4 the due-process issue, Your Honor, and I think that that's not  
5 a fair assumption. They were not involved in the proceedings  
6 here. They were not --

7 THE COURT: Or economic loss? Were -- were --

8 MR. WEINTRAUB: I can't speak to that, Your Honor.

9 THE COURT: -- non-ignition switch, economic loss  
10 plaintiffs represented before Judge Gerber?

11 MR. WEINTRAUB: I can't speak to that. I defer to  
12 counsel to say --

13 THE COURT: Well, but you know. You know the answer  
14 to that.

15 MR. WEINTRAUB: I actually don't. I want to hear  
16 what Mr. Weisfelner and Mr. Steel have to say.

17 THE COURT: All right. Fair enough.

18 MR. WEINTRAUB: So this time, in the order to show  
19 cause, I believe it was clear who the target audience was.  
20 This time, as opposed to the scheduling order, the issues in  
21 the order to show cause were spelled out with particularity.  
22 This time, we used a glossary of terms and we actually used the  
23 operative terms in the scheduling order. The ball was not  
24 hidden from anyone as to what was going to be decided here on  
25 these 2016 issues. I don't think there is any confusion by the



1 Plaintiffs, especially the non-ignition switch, post-closing  
2 accident plaintiffs as to what was going to happen here.

3 Several of them reached out to ask me if I would  
4 represent them, others appeared on their own. Going to the  
5 gatekeeper issue, I know that the Court is inclined to be a  
6 gatekeeper and --

7 THE COURT: I'm not thrilled about it, but --

8 MR. WEINTRAUB: I can help you with that, Your Honor,  
9 but I understand that. I think that there's a difference  
10 between being a gatekeeper on a category of claims, independent  
11 versus non-independent and getting granular on the merits of a  
12 claim, and I think that if something facially passes the gate  
13 because it's truly an independent claim that your job should be  
14 fairly easy and quick, and leave it to the trial court to  
15 determine whether or not the claim is valid, which is exactly  
16 what we believe Judge Gerber did several times, if you look at  
17 the December --

18 THE COURT: Well, it's just like Judge Bernstein.  
19 Judge Bernstein has done in Old Carco. I agree with that.  
20 It's not my role to decide whether state law claims are  
21 properly stated or not. I do believe that as Judge Bernstein  
22 has done and as Judge Gerber did, it's the appropriate role of  
23 the bankruptcy court to make sure that those provisions of a  
24 sale order which can be enforced are enforced.

25 MR. WEINTRAUB: So, Your Honor, forging ahead. We



1 already talked about the Second Circuit vacating the bankruptcy  
2 court as to "non-ignition switch, lower-case defects," and  
3 remanded the non-ignition switch issues to this court for  
4 proceedings consistent with the opinion. The language in the  
5 Second Circuit opinion is found at 829 F.3d at 166. In  
6 vacating and remanding, the Second Circuit expressly cites to  
7 Motors Liquidation Corp III, 531 B.R. at 360, which I believe  
8 encapsulates the due-process paradigm of the April 2015  
9 opinion.

10 If I could just read that --

11 THE COURT: Go ahead.

12 MR. WEINTRAUB: -- section into the record? If I can  
13 find it. So, again, I'm quoting from 531 B.R. at 360, and what  
14 the Second Circuit cited to was this -- I believe it was  
15 referring to this language. It just cited to the page.

16 "The non-ignition switch plaintiffs' claims remain  
17 stayed." And again, that's economic loss because of our crazy  
18 terminology.

19 "The non-ignition switch plaintiffs' claims remain  
20 stayed and properly so. Those plaintiffs have not  
21 yet shown, if they ever will, that they were known  
22 claimants at the time of the 363 sale, and that there  
23 was any kind of a due-process violation with respect  
24 to them."

25 THE COURT: And the date of that decision?



1 MR. WEINTRAUB: The date of that decision is May 27,  
2 2015, corrected on August 10, 2015. So I believe that when the  
3 Second Circuit said I'm vacating, and citing to that page and  
4 saying for further proceedings, consistent with this opinion.  
5 I think what the Second Circuit was saying is the due-process  
6 predicate is not the standard, the standard is whether or not  
7 there was subject-matter jurisdiction to bar future independent  
8 claims.

9 My last point, before I move on, Your Honor, is that,  
10 in addition to the vacation by the Second Circuit, there's a  
11 provision of the June 2015 judgment found at paragraph  
12 13(e) (2), which is a savings clause that would reinstate any  
13 dismissed lawsuits if the second circuit reverses the April and  
14 June judgment.

15 THE COURT: I've re-read that this morning.

16 MR. WEINTRAUB: Okay. I will now save you an hour  
17 and a half of Tronox and move on to issue three, Your Honor,  
18 which Mr. Steel is taking the labor or on -- I'll be brief on  
19 that. If I can just --

20 THE COURT: Sure. Go ahead.

21 We're going to take a recess at 10:30.

22 MR. WEINTRAUB: I think I can address issue three  
23 before 10:30, and then, I'll do a short back. We believe the  
24 Second Circuit used broad language concerning used car  
25 purchasers. These are all post-closing buyers with no prior



1 contact or relationship with old GM. And, again, I'm speaking  
2 for the accident plaintiffs, not the economic-loss plaintiffs.  
3 We think these are the archetypical future claimants on all  
4 fours with Grumman Olson.

5           There was no effective means to provide notice to  
6 these future crash victims, that they're successor liability  
7 claims, or they're independent claims who are about to be  
8 barred. So we don't believe the sale order can bind these  
9 claimants. There's no principal reason why the Second Circuit  
10 ruling ought to be limited to ignition-switch plaintiffs,  
11 either the claim is good or it's not good. There's nothing in  
12 the Second Circuit's expansive discussion of future claims that  
13 would --

14           THE COURT: Well, what's the language of the sale  
15 order that is argued to bar post-closing, used-car purchaser,  
16 accident claims?

17           MR. WEINTRAUB: I don't think there's any language in  
18 the sale order that addresses that. I think that there is some  
19 generic language that, you know, new GM will not be liable in  
20 any way for anything that old GM did, and that's people who  
21 have run 99 yards down the field with that.

22           THE COURT: Okay. Go ahead.

23           MR. WEINTRUAB: We think that for used-car  
24 purchasers, there was a due-process failure akin to the due-  
25 process failure for the pre-closing ignition-accident



1 plaintiffs, and the consequences should be the same.

2 THE COURT: Wait. You're -- for accident claimants?

3 MR. WEINTRAUB: Yeah. I'm drawing maybe --

4 THE COURT: As opposed to maybe --

5 MR. WEINTRAUB: -- in a perfect analogy.

6 THE COURT: Well, accident is --

7 MR. WEINTRAUB: I'm not --

8 THE COURT: You're -- you -- I'm sorry.

9 MR. WEINTRAUB: Yes. Yes. I'm only speaking for  
10 accident claims.

11 THE COURT: Yes. It's for accident claims?

12 MR. WEINTRAUB: Yes.

13 THE COURT: Used-car purchasers who were in  
14 accidents?

15 MR. WEINTRAUB: Yes.

16 THE COURT: You're -- one separate prong of your  
17 argument is they are future claimants, and they're not barred.  
18 Due process doesn't really -- doesn't impact their ability to  
19 assert those claims.

20 MR. WEINTRAUB: Yes.

21 THE COURT: Is that correct?

22 MR. WEINTRAUB: Yes. New GM argues that the used-car  
23 buyer can have no greater rights than its seller. We believe  
24 this argument was rejected by the Second Circuit.

25 THE COURT: Where does the Second Circuit reject that



1 argument?

2 MR. WEINTRAUB: I think by saying that they can't be  
3 bound by the sale order, and that they can assert their --

4 THE COURT: Well, but that's -- that seems to me to  
5 be different than --

6 MR. WEINTRAUB: They have -- as an accident victim,  
7 they have completely separate rights from their predecessor.  
8 They were injured in an accident, in a car that they didn't own  
9 at the time of the sale. And an accident that didn't --

10 THE COURT: If I accept your argument that they're  
11 future claimants; they're not bound and they can assert? First  
12 off, GM's assumption of liability of personal injury, property  
13 damage doesn't depend on whether it's an initial purchaser or a  
14 used-car purchaser, correct?

15 MR. WEINTRAUB: I think that's right. And I think  
16 that their no greater rights argument goes to the --

17 THE COURT: Really? I think it goes to the economic  
18 losses.

19 MR. WEINTRAUB: I think so too. I think so too.

20 THE COURT: And that's where I think they --

21 MR. WEINTRAUB: That was my --

22 THE COURT: I get -- you know, I think they have a  
23 lot of traction with me at least with that argument that for  
24 economic-loss plaintiffs, used-car purchasers can have no  
25 greater rights than the initial owner of the vehicle would





1 have. It didn't -- their argument is, it can't morph into  
2 something greater just because the car passes -- well, I'm sure  
3 I will hear plenty of argument of why they -- people don't  
4 believe that's correct, but I understand GM's argument that for  
5 economic-loss claim, used-car purchasers can't have any greater  
6 rights than the party from whom they purchased the vehicle.

7 MR. WEINTRAUB: And my only point in going maybe a  
8 step further was to avoid being tarred by that brush. I don't  
9 think that argument applies to us. I think we're --

10 THE COURT: I understand your argument. You're --  
11 when you're dealing with accident, Grumman Olson that's not the  
12 only case, but Grumman Olson, and I think -- you know, I  
13 thought it was interesting that Judge Bernstein interpreted the  
14 sale order in Grumman Olson. You know, one possible  
15 interpretation that he could bar those claims, but he  
16 interpreted it, no, you can't -- it didn't bar those claims,  
17 because you can't bar those claims --

18 MR. WEINTRAUB: Right.

19 THE COURT: -- because they're unknown, and --

20 MR. WEINTRAUB: Right.

21 THE COURT: But he engaged -- I think, somewhat  
22 similar to what the Second Circuit did here is, Judge Bernstein  
23 engaged in an interpretation of the sale order. He did it  
24 having in mind principals about future claims and things of  
25 that nature.



1 MR. WEINTRAUB: And, again, I just don't want to get  
2 tarred with the -- with that brush. We think that there was --  
3 to the extent there is no --

4 THE COURT: You're just going to let your colleagues  
5 be targeted, but --

6 MR. WEINTRAUB: Yeah, I actually believe that  
7 Mr. Weisfelner can take care of himself probably better than I  
8 can. The -- to the extent there was any due-process issue at  
9 all, it's really the impossibility of reaching these people,  
10 because they're not unknown creditors who can be bound by  
11 constructive notice. These are not yet creditors, and I think  
12 that's a significant difference.

13 And with that, Your Honor, with five minutes to  
14 spare, I will stop here, and then, resume with issue four after  
15 the break.

16 THE COURT: Okay. Let's take a 15-minute recess, and  
17 then we'll resume.

18 (Recess taken at 10:24 a.m.)

19 (Proceedings resumed at 10:40 a.m.)

20 THE COURT: All right. Please be seated. We're back  
21 on the record in Motors Liquidation.

22 Mr. Weintraub, are you done?

23 MR. WEINTRAUB: No. I have issue four. Although you  
24 indicated I may be doomed on issue four, but I'll --

25 THE COURT: Go ahead.



1 MR. WEINTRAUB: I thought I could briefly try anyway.  
2 Thank you, Your Honor. William Weintraub for the Non-Ignition  
3 Switch Post-Closing Accident Plaintiffs now with respect to  
4 issue four. The non-ignition switch post-closing accident  
5 plaintiffs are future creditors whose successor liability  
6 claims cannot be barred by the sale order. This circuit --  
7 Second Circuit has not yet ruled on whether the bankruptcy  
8 court can bar future tort creditors from asserting successful  
9 liability claims. We believe that future tort creditors  
10 present a different due process issue than existing tort  
11 creditors.

12 In this case, the ignition switch pre-closing  
13 accident plaintiffs were known existing creditors denied due  
14 process. As a result, the Second Circuit held the sale order  
15 could not barr their successor liability claims. Mullane-style  
16 publication notice only works for unknown creditors. That is,  
17 persons that have already been injured in an accident but who  
18 are unknown to the debtor. The due process issue for  
19 non-ignition switch post-closing accident plaintiffs is that as  
20 future tort claimants they were not yet creditors at all for  
21 their future tort claims at the time of the sale. As a result,  
22 there was no notice that could have been effectively -- given  
23 to them that would have effectively notified them that their  
24 rights were about to be affected.

25 THE COURT: Go ahead.



1 MR. WEINTRAUB: Oh. In this case, there was no  
2 future claims representative appointed. The Second Circuit  
3 sidestepped --

4 THE COURT: Let's just say I -- let's assume I agree  
5 with all of that. Okay? The question in my mind, if you get  
6 to the -- this is a punitive damage issue as part of issue  
7 four.

8 MR. WEINTRAUB: It's primarily punitive damages. But  
9 also, because of -- I assume the Court is going to say they've  
10 assumed liability. It's partially the punitive damages issue.  
11 But also, the scope of the assumption of liability, I think, is  
12 more narrow than if they were determined to be a successor,  
13 which would be the full range of --

14 THE COURT: Well, I --

15 MR. WEINTRAUB: -- liability.

16 THE COURT: I don't know about that. That's the  
17 point. Are there any cases -- is -- are there any cases either  
18 assume liability from a debtor of -- an insolvent debtor,  
19 assume liability from an insolvent debtor or successor  
20 liability based on an insolvent debtor that have permitted the  
21 recovery of punitive damages?

22 MR. WEINTRAUB: I don't know the answer to that  
23 question, Your Honor. Candidly, we didn't look to see if there  
24 were any. But we did talk about cases where the court makes it  
25 clear that the successor stands in the shoes of the predecessor



1 and has the same liability. And if --

2 THE COURT: And if that liability -- if the -- well,  
3 that's -- this is really the question, is with Gary (phonetic)  
4 and the authority that supports it that if punitive damages  
5 can't be recovered from the debtor, can they be recovered from  
6 -- technical term using the word "successor." Okay? Because  
7 of the assumed liability or successor liability theory, if the  
8 debtor couldn't be liable for punitive damages, how could  
9 that --

10 MR. WEINTRAUB: Well, I want to distinguish between  
11 bankruptcy dollars and real dollars. Clearly, the debtor could  
12 have been liable for punitive damages if it -- you know, the  
13 requisites for the imposition of punitive damages had been met.  
14 The fact that --

15 THE COURT: -- liability in Chapter 7 you can't  
16 recover punitive damages.

17 MR. WEINTRAUB: Sure you can, if the debtor's  
18 solvent. It's only subordinated, it's not disallowed.

19 THE COURT: Right. Okay. So you don't have any  
20 question that Old GM was insolvent?

21 MR. WEINTRAUB: No. But I don't think that the fact  
22 that this debtor was insolvent precludes the successor from --  
23 precludes the plaintiff from recovering from the successor.

24 THE COURT: That's what I want to see some authority  
25 on.



1 MR. WEINTRAUB: Well, Your Honor, but by --

2 THE COURT: Is this a question of first impression?

3 MR. WEINTRAUB: By that token -- not to give New GM  
4 any ideas that they probably haven't thought about, but by that  
5 token then on the assumed liabilities they'd only pay 30 cents  
6 on the dollar.

7 THE COURT: No. I don't think that follows. But if  
8 an insolvent debtor can't be liable for punitive damages, how  
9 does the successor, whether by assumption or a successor  
10 liability theory, become liable for your damages? What I want  
11 to know is are there cases that address the issue or is this a  
12 question of first impression?

13 MR. WEINTRAUB: I think this may be a case -- a  
14 question of first impression. Because if --

15 THE COURT: So it's clear then that you don't have  
16 any authority that addresses the issue one way or the other?

17 MR. WEINTRAUB: Nor does General Motors, we think.

18 THE COURT: I --

19 MR. WEINTRAUB: Yes?

20 THE COURT: I'll -- we'll let Mr. Steinberg make his  
21 argument.

22 MR. WEINTRAUB: Right.

23 THE COURT: But I -- my question is to you. You have  
24 no authority that addresses the issue whether New GM can be  
25 liable for punitive damages if Old GM could not?



1 MR. WEINTRAUB: I have no authority for that. But  
2 there is no negative authority that says it cannot be. And  
3 there is authority for the proposition that the liability, for  
4 want of a better term, is derivative. It's the same liability  
5 that the debtor would have had. The fact that this debtor is  
6 unable --

7 THE COURT: They may pay a hundred cents on the  
8 dollar rather than ten cents on the dollar, but -- on the basic  
9 claim. You know, if you have a debtor that ultimately is going  
10 to be 90 cents on the dollar, well, you'll get 90 cents on the  
11 dollar but you won't get punitive damages on top of it.

12 MR. WEINTRAUB: That's correct that if the debtor  
13 were barely insolvent then no creditor would get a hundred  
14 cents on the dollar. But I don't think that the distribution  
15 in the bankruptcy case would curtail the ability to recover  
16 from the successor for whatever the liability of the  
17 predecessor was. And I want to distinguish between ability to  
18 pay and whether or not there's a valid claim. You could  
19 litigate a claim against Old GM and get an award of punitive  
20 damages that the Court would say, okay, but that's subordinated  
21 so I don't need to give you any more than you would have -- I'm  
22 talking about just a claim without successor liability, just a  
23 claim against Old GM.

24 THE COURT: You think the claim would go to a jury as  
25 to whether punitive damages -- if there's no issue as to



1 solvency, it's insolvent, does the claim go to the jury for  
2 punitive damages against Old GM?

3 MR. WEINTRAUB: I actually don't know what an  
4 individual judge might do in those circumstances. But there is  
5 certainly situations in bankruptcy cases where assets show up  
6 or litigation claims turn into dollars so that a debtor that is  
7 insolvent one minute can be solvent the next minute if it has a  
8 litigation success. So it doesn't moot the ability of a  
9 creditor to prove up its claim. And it shouldn't boot the  
10 ability of a creditor to assert punitive damages.

11 THE COURT: All right. Go ahead.

12 MR. WEINTRAUB: So we believe that Grumman Olson is  
13 on point. We don't think the fact that the plaintiff in  
14 Grumman was not a pre-sale purchaser of the defective truck  
15 parts, it was merely a driver for the post-sale purchaser of  
16 the truck parts, is a distinction that makes a difference. The  
17 animating principle emphasized by the District Court in Grumman  
18 was as follows. And I'm quoting from Grumman but I'm replacing  
19 names for personal injury plaintiffs and reading this abridged  
20 quote:

21 "The personal injury plaintiffs did not receive  
22 adequate notice of their potential claim in the  
23 Grumman bankruptcy proceedings because at the time of  
24 the bankruptcy there was no way for anyone to know  
25 that the personal injury claimants would ever have a





1 claim. Enforcing the sale order against the personal  
2 injury plaintiffs to take away their right to address  
3 under a state law theory of successor liability when  
4 they did not have notice or an opportunity to  
5 participate in the proceedings that resulted in that  
6 order would deprive them of due process."

7 And that's 467 B.R. at 708, 709. And the District  
8 Court cites to the Schwinn case. The Schwinn case is a  
9 significant citation because factually in that case the  
10 exercise bicycle that harmed the plaintiff in that case was  
11 sold by the predecessor company before the bankruptcy sale. So  
12 this is -- Schwinn is analogous to what we're talking about in  
13 General Motors where there was a pre-bankruptcy sale but no  
14 injury until after the bankruptcy. We believe that that is a  
15 future claimant the same as the claimant was in Grumman. The  
16 focus in Grumman was not about when the victim acquired the  
17 defective merchandise. Instead, the focus was the  
18 impossibility of getting meaningful notice to a future claimant  
19 who at the time of the bankruptcy sale was not yet a creditor.

20 I already talked about the fact that constructive  
21 notice doesn't work for future claimants because they're not  
22 yet creditors under the Mullane construct.

23 Your Honor, we will -- we already had a colloquy  
24 about the punitive damages aspect.

25 THE COURT: Well, that's my biggest question --



1 MR. WEINTRAUB: Yes.

2 THE COURT: -- Mr. Weintraub --

3 MR. WEINTRAUB: So I'm editing down as we -- as I  
4 stand here. So here and in every case the tort victims are  
5 involuntary creditors. They didn't volunteer to be injured.  
6 Their permission was not sought when New GM assumed what it  
7 contends is limited liability for post-sale accidents. After  
8 their sale -- after their post-sale crashes occurred, the  
9 plaintiffs are simply looking to all available remedies. One  
10 available remedy, successor liability, we think is part of that  
11 punitive damages. And another available remedy is the assumed  
12 liability by New GM. The inability to pay issue that we talked  
13 about in almost every case of successor liability, the  
14 predecessor has an inability to pay because it's done --

15 THE COURT: And that may or may not be true. I don't  
16 know. I mean --

17 MR. WEINTRAUB: Well, in most cases it's done a  
18 transaction that's divested the assets that generated the  
19 income that made it able to pay its debts when it was still  
20 operating its business. Obviously if --

21 THE COURT: Most successor liability cases have  
22 nothing to do with bankruptcy.

23 MR. WEINTRAUB: Well, Your Honor, if the predecessor  
24 was left solvent because it was paid \$80 billion then you  
25 wouldn't need to look to the successor. So the law of



1 successor liability developed as an equitable remedy really at  
2 the crossroads of, you know, legal principles in the general  
3 proposition that a successor does not take on the liabilities  
4 of its predecessor. But successor liability is an equitable  
5 remedy under appropriate circumstances. And we think the  
6 circumstances would be appropriate here depending upon what the  
7 law of a particular jurisdiction is. Which again, this gets  
8 through the gate, but we're not asking you to decide that  
9 they're a successor or that there should be punitive damages,  
10 just the ability to seek to assert that claim.

11 In terms of deterrence, we think that even though New  
12 General Motors is no longer in business -- I'm sorry, Old  
13 General Motors is no longer in business, New General Motors is  
14 populated by the same people that were at Old General Motors so  
15 that we think that deterrence is a real issue here. I also  
16 would note that post-sale because of the ignition switch  
17 defect, New General Motors paid a \$900 million civil penalty  
18 and entered into a deferred prosecution agreement precisely  
19 because they delayed the recall on the ignition switch vehicle.  
20 So deterrence is an effective tool with respect to New GM.

21 In terms of the prior briefing on punitive damages,  
22 that was limited to whether or not punitive damages were an  
23 assumed liability under 2.3(a)(9) with respect to the specific  
24 clients that I represented.

25 THE COURT: And Judge Gerber -- and he concluded



1 that --

2 MR. WEINTRAUB: They were not.

3 THE COURT: -- punitive damages was not an assumed  
4 liability.

5 MR. WEINTRAUB: That's correct.

6 THE COURT: He said that New GM assumed liability for  
7 extra values, not for --

8 MR. WEINTRAUB: That's correct. But we did prevail  
9 on the imputation point and on the independent claim point so  
10 that those are --

11 THE COURT: Well, if you had punitive -- I haven't --  
12 Judge Gerber -- I think he didn't bar the possibility under  
13 state law for punitive damages on truly independent claims.

14 MR. WEINTRAUB: No, I understand that. This is just  
15 another path to punitive damages for those who seek to assert  
16 that claim under the appropriate circumstances.

17 THE COURT: You will agree that punitive damages  
18 against New GM are not available with respect to assumed  
19 liabilities?

20 MR. WEINTRAUB: Contractually, yes. That was  
21 litigated then and we were not successful for our specific  
22 clients. And the decision was made not to appeal that. As to  
23 whether or not that binds others, I'm not here to say yay or  
24 nay. But that's not the argument I'm making today. I'm  
25 talking about liability as a successor separate and apart from



1 what was assumed.

2 I talked about already that mere ownership of the  
3 vehicle at the time of the sale is not enough of a connection  
4 or relationship to bar future claims. And to the extent that  
5 these were known creditors because they had a repair right,  
6 that we have a due process violation. And we would say that  
7 they should have the same rights as the ignition switch  
8 plaintiffs. But again, we're not litigating due process. But  
9 if the -- if counter argument was they were known creditors,  
10 then that would be an acknowledgment of a due process  
11 violation.

12 Whatever the notice was here was insufficient to  
13 reach these people. It was insufficient not just in terms of  
14 the practical inability to warn people who had not yet been  
15 injured but also the content of the notice itself didn't talk  
16 about successor liability or independent claims.

17 THE COURT: Your -- I said this before. Your view is  
18 that the due process issue is not relevant to the future  
19 claimants?

20 MR. WEINTRAUB: That's correct. That's correct, Your  
21 Honor. But in the event someone --

22 THE COURT: Yes.

23 MR. WEINTRAUB: -- disagrees, then that would be my  
24 point. So, Your Honor, that, I think, concludes it. I did  
25 address the non-ignition switch colloquial upper case/lower



1 case point that was raised by New General Motors. I thought  
2 that our letter spoke for itself. If you have any questions to  
3 me about the letter, I'm -- I'd be happy to answer them.

4 THE COURT: Yeah. I guess -- I think -- no question.

5 MR. WEINTRAUB: Thank you.

6 THE COURT: Thanks.

7 Mr. Weisfelner?

8 MR. WEISFELNER: Thank you, Judge. And, Your Honor,  
9 for the record, Edward Weisfelner together with my partner,  
10 Howard Steel, of Brown Rudnick. I want the record to reflect  
11 clearly that I'm reading from Mr. Steel's notes and have  
12 otherwise stolen the spotlight I promised to him. He will  
13 address a number of the other issues. But since --

14 THE COURT: So why are you doing it if he -- if  
15 you --

16 MR. WEISFELNER: Well, I guess because I can't help  
17 myself, number one. And number two --

18 THE COURT: You could barely help yourself when you  
19 were behind the table with --

20 MR. WEISFELNER: And number two, because I do think,  
21 without having had an opportunity to go back and check on it,  
22 one of the issues Your Honor raised with regard to the August  
23 transcript is probably my commentary. And I thought it --

24 THE COURT: I assumed it was, but --

25 MR. WEISFELNER: And I thought it was important, Your



1 Honor, that --

2 THE COURT: Can I ask you this question?

3 MR. WEISFELNER: -- I address it. Sure.

4 THE COURT: Who do you represent?

5 MR. WEISFELNER: Your Honor, we were retained by the  
6 lead counsel in the MDL, all three of them, Messrs. Berman,  
7 Ms. Cabrayas (phonetic), and -- I'm going to forget --

8 UNIDENTIFIED: And Mr. Hilliard.

9 MR. WEISFELNER: And Mr. Hilliard. There was a  
10 selection process that was made -- I guess it was after the  
11 time that they were appointed as lead counsel by Judge  
12 Furman -- appreciating that because of the processes that had  
13 begun in the bankruptcy court, both with respect to motions to  
14 enforce and an adversary proceeding that had been filed by  
15 another's plaintiff's firm, that lead counsel wanted to have  
16 bankruptcy lawyers representing them. Originally, there were  
17 three designated counsel, three firms: our firm, the firm of  
18 Stutzman --

19 UNIDENTIFIED: Esserman, Sandy Esserman.

20 MR. WEISFELNER: Mr. Esserman's firm. And then we  
21 had -- the third firm was Caplin & Drysdale. Subsequently,  
22 Caplin & Drysdale dropped out. And at some point in time  
23 Mr. Hilliard retained Mr. Weintraub to represent accident  
24 victims as opposed to economic loss parties.

25 THE COURT: So let me ask you now, you say you were



1 retained by lead counsel in the MDL. Who were their clients?

2 MR. WEISFELNER: Your Honor, I presume that their  
3 clients are the putative members of the class -- or classes,  
4 actually, yet to be certified that are proceeding in the MDL  
5 before Judge Furman.

6 THE COURT: So --

7 MR. WEISFELNER: But I should also add --

8 THE COURT: -- derivatively do you represent  
9 non-ignition switch economic loss plaintiffs?

10 MR. WEISFELNER: I believe we do, Your Honor. And --

11 THE COURT: And have since the start?

12 MR. WEISFELNER: And have since the start. And what  
13 I was going to do before I addressed your specific concerns  
14 about what was the August commentary all about --

15 THE COURT: First I'm trying to figure out when you  
16 spoke in August who were you representing.

17 MR. WEISFELNER: And I think it's fair enough to say  
18 that we took on the mantle, both self -- we put the mantle on  
19 ourselves. But I think Judge Gerber in an effort to streamline  
20 the process and make it more efficient recognized designated  
21 counsel as the primary spokesperson for both ignition switch  
22 and non-ignition switch economic loss parties, provided that  
23 other people who thought that we weren't adequately addressing  
24 their concerns had the opportunity to independently address the  
25 court, but only after sort of assuring themselves that we were,





1 to adopt the colloquial, screwing up.

2 THE COURT: Sure.

3 MR. WEISFELNER: But, Your Honor, I wanted to again,  
4 you know, address from my vantage point your concern about the  
5 August statement. The concern I felt coming from the Court  
6 about the concept of laches or waiver or sitting on one's  
7 rights with regard to due process concerns as they may impact  
8 on this, why certain judgments of Judge Gerber weren't appealed  
9 and what impact that has on the going forward ability to prove  
10 up one's case. I think in order to do this effectively, I want  
11 to make sure -- as I'm sure Your Honor could research this on  
12 your own. But I thought it would be helpful just to tell you  
13 who are the plaintiffs that are in the MDL in connection with  
14 the FACC. And I guess the FACC stands for the Fifth Amended --

15 UNIDENTIFIED: Fourth.

16 MR. WEISFELNER: -- Fourth Amended Consolidated  
17 Complaint. And, Your Honor, in category A or -- you know, who  
18 are the non-ignition switch plaintiffs? There are  
19 nine-and-a-half million -- nine-and-a-half-plus million  
20 vehicles that we internally refer to as the low-torque ignition  
21 switch vehicles. They involved recall numbers 14V-355, some  
22 three-million-plus vehicles. And if you look at the recall  
23 itself, it talks about ignition key slot defect.

24 THE COURT: When was that -- when was that recall?

25 MR. WEISFELNER: They were all done in 2014 in the



1 summer.

2 THE COURT: I understand. But the defined term  
3 "ignition switch plaintiffs" here refers to the February and  
4 March 2014 --

5 MR. WEISFELNER: Correct. The subsequent recall,  
6 recall number 14-355 was --

7 UNIDENTIFIED: July.

8 MR. WEISFELNER: -- in July, I believe.

9 THE COURT: Of 2014?

10 MR. WEISFELNER: Yes, Your Honor. Second, you had  
11 recall number 14V-394, involved a little over a half a million  
12 vehicles. And the recall talked about, and I'm quoting,  
13 "Unintended ignition rotation defect."

14 THE COURT: When was that one?

15 MR. WEISFELNER: Also in --

16 UNIDENTIFIED: July.

17 MR. WEISFELNER: -- July of that same year. And then  
18 finally -- or penultimately you had recall number 14V-400, over  
19 5.8 million vehicles. And the recall spoke about again  
20 "Unintended ignition rotation defect."

21 THE COURT: When was that one?

22 MR. WEISFELNER: July of same year.

23 THE COURT: All right. So there were three --

24 MR. WEISFELNER: Almost done.

25 THE COURT: -- recalls in February and March.



1 MR. WEISFELNER: Almost done.

2 THE COURT: Okay.

3 MR. WEISFELNER: There's more than three.

4 THE COURT: (Indiscernible)

5 MR. WEISFELNER: You then had about a half million  
6 vehicles involved in recall number 14V-346. And the recall  
7 talked about knee to knee Camaro defect vehicles. These are  
8 ignition-related defects that according to the recall could be  
9 triggered by contact between the driver's knee and the ignition  
10 switch.

11 THE COURT: And when was that?

12 MR. WEISFELNER: I believe it was also July or maybe  
13 August, but within a month of the other recalls. Now, those  
14 are everything that in lower case terms are involved with  
15 ignition switches in multiple vehicle lines and beyond the  
16 initial ignition switch defect claims that only involved about  
17 a million or a million-two vehicles.

18 THE COURT: So one of the questions I wrote to  
19 myself, are there any facts in the record that show a  
20 relationship or nexus between the recalls covered by 14V-047  
21 and any later recalls, ignition --

22 MR. WEISFELNER: Tons --

23 THE COURT: -- related --

24 MR. WEISFELNER: -- and tons of material in the  
25 record that deal with the manufacturer of the switch throughout



1 all of the different vehicle platforms. Tons and tons of  
2 information in the record that deals with when New GM knew or  
3 should have known.

4 THE COURT: Let me ask the rest of the question  
5 (indiscernible).

6 MR. WEISFELNER: Yes, sir.

7 THE COURT: This -- when I went through them, which  
8 apparently these were questions I wrote to myself, in -- with  
9 respect to the same thing about a nexus or relationship, was  
10 there any fact finding either by NHTSA or by Valukas or anyone  
11 else that you contend shows that the defects other than 14V-047  
12 were defects that were known to Old GM before the 363 sale?

13 MR. WEISFELNER: Yes, Your Honor. And in point of  
14 fact, the fourth amended consolidated complaint does in fact  
15 allege that New GM knew about all of these defects in Old GM  
16 and New GM vehicles because some of the vehicles were in fact  
17 manufactured by New GM, but that they concealed this material  
18 information with the intent to deceive the plaintiffs.

19 THE COURT: Has there been discovery on that?

20 MR. WEISFELNER: Your Honor, they're in point of fact  
21 has been discovery in front of Judge Furman in the MDL. I  
22 don't believe it's been completed, but I believe that discovery  
23 has commenced with regard to those issues.

24 And, Your Honor, I also think it's important to note  
25 two other recalls that are the subject of the fourth amended



1 complaint in front of Judge Furman. And they involve about 1.2  
2 million vehicles subject to recall number 14V-118. I believe  
3 the 14 is the year, 2014. I'm not certain what the month was.  
4 But that recall, 14V-118 for 1.2 million vehicles, involved  
5 side airbag defects. And then finally, the FACC asserts claims  
6 on behalf of approximately 1.3 million vehicles involved in  
7 recall number 14V-153. And that recall involved power steering  
8 defects.

9 I should also tell Your Honor that --

10 THE COURT: Let me ask you with respect to 14V-118  
11 and --

12 MR. WEISFELNER: Yes, sir.

13 THE COURT: -- 14V-153 --

14 MR. WEISFELNER: Yes, sir.

15 THE COURT: -- was there any fact finding by NHTSA or  
16 Valukas or anyone else that you believe supports showing that  
17 Old GM knew about those defects before the 363 sale?

18 MR. WEISFELNER: Your Honor, I would -- I don't  
19 believe that there was anything in the Valukas report or --

20 THE COURT: Just on the ignition switch --

21 MR. WEISFELNER: -- NHTSA as it related to power  
22 steering. As it related to the side airbag defect, since my  
23 basic knowledge of the underlying facts is that if the ignition  
24 switch is rotated out of the on position into either off or  
25 accessory that that has an impact on the side airbags, I don't



1 know if they're related. I just -- sitting here today I can't  
2 tell you. But I do know that there are facts that exist in the  
3 FACC that assert that all of these defects were known by both  
4 Old GM and New GM and certainly were known by New GM way in  
5 advance of the recalls themselves.

6 THE COURT: You say that discovery -- your  
7 understanding is discovery is not complete on it?

8 MR. WEISFELNER: Correct.

9 THE COURT: Is that -- did Judge Furman identify  
10 issue -- were these identified as issues as to which discovery  
11 would go forward?

12 MR. WEISFELNER: Yes.

13 THE COURT: And is there a deadline when the  
14 discovery is going to be completed on this, on the --

15 MR. WEISFELNER: I don't know the answer to that.

16 UNIDENTIFIED: September 1st.

17 MR. WEISFELNER: I'm not being told by much smarter  
18 people that it's September when discovery is intended to be  
19 complete on these issues.

20 THE COURT: And I'm far from making such a decision,  
21 but if I decided that the Court had to have an evidentiary  
22 hearing to determine whether Old GM knew about these defects  
23 and concealed it such that there was a due process violation,  
24 when will you be prepared to go to trial?

25 MR. WEISFELNER: Your Honor, again, I think it's the



1 view of the plaintiffs -- and I think it's shared by New GM --  
2 that determinations with regard to what Old GM knew and when it  
3 knew it and the extent to which that knowledge, if any, can be  
4 imputed to New GM, and what the consequences are as it relates  
5 to the sale order, are all issues that Judge Furman intends,  
6 either with or without input from this Court but based on the  
7 record including the Second Circuit decision, he will determine  
8 on his own.

9 THE COURT: Okay.

10 MR. WEISFELNER: Your Honor, I think it's also  
11 important as we focus on independent claims that are being  
12 asserted against --

13 THE COURT: So why are we -- if Judge Furman is going  
14 to address those, why am I even bothering to address whether  
15 non-ignition switch plaintiffs, whether their claims are barred  
16 by the sale order?

17 MR. WEISFELNER: Well, I think, Your Honor, there are  
18 two different parts to this, which in part goes to the answer  
19 of what was I talking about in August and why didn't we appeal  
20 and how long am I entitled to sit on my rights before I make an  
21 issue out of it.

22 THE COURT: Let's assume that I agree that  
23 Judge Gerber did not expressly address the issue. It's  
24 debatable. I could easily -- I could conclude he did and I  
25 could conclude he didn't. But let's assume that I agree he



1 didn't. That's why I focused earlier on when you spoke in  
2 August it seems that you were quite aware that there was this  
3 potential due process issue.

4 MR. WEISFELNER: And let me just address that head  
5 on.

6 THE COURT: Okay.

7 MR. WEISFELNER: Your Honor, there were due process  
8 considerations that impacted any number of potential claims and  
9 causes of action that our plaintiffs were anxious to pursue.  
10 On the one hand, you had questions about the extent to which  
11 due process or a finding of due process violation -- and by the  
12 way, under the rubric of Judge Gerber, it wasn't just a finding  
13 of a violation of due process. It was a coupling of a finding  
14 of a due process violation --

15 THE COURT: Sorry. Just a second. I caught the  
16 wire.

17 MR. WEISFELNER: -- together with a showing of harm  
18 as a consequence of that due process violation. To our mind,  
19 that paradigm impacted most significantly the question of  
20 whether or not you were bound by the sale order itself as it  
21 related to pursuit of successor liability claims. It had  
22 always been our view -- when I say our view, I meant the  
23 plaintiffs' view -- that there is nothing about a 363 sale --  
24 in fact, there is no jurisdiction within the bankruptcy  
25 court -- for that matter, I don't think there's any





1 jurisdiction within the federal court system, whether you're  
2 talking about an Article 1 or an Article 3, Judge, that would  
3 afford the buyer of assets in a sale protection into the future  
4 for its own tortuous actionable conduct.

5 THE COURT: The independent claims, you're talking  
6 about?

7 MR. WEISFELNER: The so-called independent claims.

8 THE COURT: I understand your side's position on  
9 that.

10 MR. WEISFELNER: Of course, we had to -- and part of  
11 what Judge Gerber did was take a look at the actual pleadings  
12 that were stamped at that time, which I think was maybe the  
13 second amended consolidated complaint, to determine whether or  
14 not any of our independent claims as asserted crossed the line.  
15 And by crossing the line, I mean generally speaking that you  
16 were asserting claims against New GM that rested in whole or in  
17 part on bad conduct by Old GM. And as Judge Gerber determined  
18 in that proceeding, most, if not all, of the independent  
19 claims, so long as they were scrubbed and cleaned up, with  
20 regard to your reference to Old GM, passed through the  
21 proverbial bankruptcy gate and were matters to be determined on  
22 the merits by the trial courts, including the MDL.

23 Now, Your Honor, there has been lots of proceedings  
24 before Judge Furman on what constitutes an actionable  
25 independent claim on the theory and the view that they've



1 already passed through the bankruptcy gate. So for Your Honor,  
2 what remains in the FACC is violations of Consumer Protection  
3 Unfair and Deceptive Trade Practices Act; number two,  
4 fraudulent concealment; number three, unjust enrichment,  
5 although we're down to a very narrow number of jurisdictions in  
6 which that cause of action may in fact apply; breach of implied  
7 warranty of merchantability, and that's still alive for most  
8 state laws; the Magnuson-Moss Warranty Act, still alive in most  
9 state laws; the negligence --

10 THE COURT: Wasn't that an assumed liability?

11 MR. WEISFELNER: Excuse me?

12 THE COURT: Wasn't that an assumed liability?

13 MR. WEISFELNER: There were warranty assumptions.

14 And the Moss -- the Magnuson-Moss Warranty Act is only asserted  
15 for owners or lessees of vehicles that were sold or leased as  
16 new, certified pre-owned vehicles. So in colloquial terms,  
17 they had the stamp of New GM on them.

18 Negligence, which we've only asserted under the laws  
19 of four jurisdictions. A violation of RICO, which is a claim  
20 that Judge Furman has already dispelled with, but it's been  
21 asserted to preserve the claim for appeal. That only applies  
22 to certain plaintiffs.

23 My point being that when the general comment was made  
24 about we recognize the need to tee up the issue, that was not  
25 with respect to the ability to pursue independent claims.



1 Rather, it was with respect to the ability to pursue successful  
2 liability.

3 Now, I will tell Your Honor that in terms of being  
4 criticized for not teeing it up, I need to say a couple of  
5 things. Number one, it's been teed up and it's been teed up  
6 before Judge Furman in the FACC. That's why discovery is going  
7 on with respect to those issues. Number two, and perhaps more  
8 importantly, it was clearly teed up, if you will, in connection  
9 with the proofs of claim that the plaintiffs filed in this  
10 court for both upper case ignition switch plaintiffs and lower  
11 case ignition switch plaintiffs, as well as side airbag, as  
12 well as the other defect. So all of these issues, including  
13 the question of whether or not there's a due process violation  
14 that needs to be established as a prerequisite to the allowance  
15 of the claim -- and remember this is a claim against Old GM,  
16 not an independent claim -- and may be relevant to the extent  
17 that successor liability exists.

18 The last thing I want to tell Your Honor --

19 THE COURT: Let me -- you first -- tell me and then  
20 I'll ask my question.

21 MR. WEISFELNER: Okay. The fact that this counsel  
22 table was throughout the course of these proceedings occupied  
23 by designated counsel of one flavor, variety, or another, did  
24 not preclude the Greek chorus that sat behind us through most  
25 of these proceedings --



1 THE COURT: It's dwindling.

2 MR. WEISFELNER: It is dwindling, but only because  
3 we've invited the head Greek to sit up at our table, Professor  
4 Peller. But Mr. Peller, among others, made the point at  
5 various times throughout the proceedings before Judge Gerber  
6 that they wanted to stop the process and insisted on discovery.  
7 And the massive discovery that they were looking for before any  
8 other procedures or rulings could be determined was discovery  
9 with regard to the underlying facts and circumstances that  
10 could go into the due process argument, a known defect that was  
11 hidden or a known defect that didn't give rise to the sort of  
12 notice that would otherwise be necessary under the due process  
13 case law. And I had numerous conversations with new GM's  
14 counsel, in particular Mr. Steinberg, about whether or not it  
15 was in the best interests of both the plaintiffs through their  
16 designated counsel and New GM for us to stop the clock and do  
17 what we avoided the first time around, which was to take  
18 stipulated facts primarily out of the Valukas report, Mary  
19 Darrow's testimony. We now had the deferred prosecution  
20 agreement. We now had the NHTSA, in effect, series of reports.  
21 Given all of that, did we want to stop the processes  
22 and engage in massive, expensive discovery in front of the  
23 bankruptcy court on these due process issues? Or should we  
24 wait until it all wound it's way to the MDL and state courts?  
25 And to the extent it remained an issue, especially as it



1 related to independent claims but even if it remained an issue  
2 with regard to successor liability, there's a better time and  
3 place to do all that.

4 At no point in time was there a disagreement between  
5 us and New GM where New GM was of the view I want to start the  
6 ball rolling now. It's your obligation. Undertake it.  
7 Undertake it now or be forever barred. Not even be forever  
8 barred. Be hit with the notion of laches or waiver or any  
9 other issue preclusion. We had always assumed that that sort  
10 of discovery, if ever needed or required by any party, would  
11 happen someplace else at some other time.

12 THE COURT: I'm going to ask you this. And do I  
13 have -- I gather -- I didn't bring all the volumes out. There  
14 were volumes of documents from last time. I brought the two  
15 volumes that recently got delivered. A copy of any scheduling  
16 orders by Judge Furman where the due process issues or  
17 non-ignition switch plaintiffs has -- where he has expressly  
18 dealt with discovery will go forward and what the process will  
19 be? Because I -- it may be there. I didn't -- I haven't  
20 seen --

21 MR. WEISFELNER: Your Honor, I do know that  
22 Mr. Steinberg and his colleagues have been extraordinarily  
23 diligent consistent with prior orders of both Judge Gerber and  
24 by implication Your Honor to attempt to keep Your Honor advised  
25 of all relevant developments in front of Judge Furman.



1 THE COURT: I wouldn't want you to think for a moment  
2 that I don't read every piece of paper that comes across my  
3 desk because --

4 MR. WEISFELNER: And my next statement was going to  
5 be I think it may be worthwhile process for the folks that know  
6 a lot more about what goes on in front of Judge Furman on a  
7 day-to-day basis to attempt to cull for you in a very short  
8 period of time those orders, be they scheduling orders or  
9 discovery orders, that demonstrate in point of fact what the  
10 scope of discovery is that is currently proceeding before Judge  
11 Furman with a September deadline. And we would undertake,  
12 together with help from Mr. Steinberg, to do just that.

13 THE COURT: Yeah.

14 MR. WEISFELNER: Your Honor --

15 THE COURT: (Indiscernible). Mr. Steinberg, do I  
16 have any paper among the lot of paper that I have that reflects  
17 what discovery is going forward, you know, where Judge -- where  
18 Judge Furman has entered some order that specifies what the  
19 issues that are subject to discovery in the September cutoff?

20 MR. STEINBERG: I don't think Your Honor has the  
21 complete set. But in connection with the letter we filed to  
22 correct those statements made at the last hearing, we attached  
23 two of the discovery orders that demonstrated that discovery  
24 was actually being taken at the MDL.

25 THE COURT: Oh, I know. You -- and I didn't so much



1 focus on where. Your point was, I think, that -- my take away  
2 from your letter, which I did read, was that there was an  
3 arguably inaccurate statement made at the last hearing when I  
4 inquired about participation of those or discovery with respect  
5 to due process and non-ignition switch plaintiffs. And you  
6 did -- and I did note that you pointed out the discovery in the  
7 MDL, not (indiscernible).

8 MR. STEINBERG: Right. There are over a hundred  
9 orders that Judge Furman --

10 THE COURT: I don't want a hundred orders.

11 MR. STEINBERG: -- has entered on an interim basis --

12 THE COURT: I don't want a hundred orders.

13 MR. STEINBERG: -- some of which relate to discovery.  
14 And there are status conference letters that indicate on a  
15 monthly basis how much discovery has progressed in 2015 and  
16 2016.

17 THE COURT: I would like to see -- I don't want to  
18 see a hundred orders. If there are a few orders that make  
19 clear that discovery is going forward in the District Court on  
20 non-ignition switch plaintiff due process issues and that Judge  
21 Furman is going to decide, that's what I'd like to see.

22 MR. STEINBERG: Your Honor, if the specific question  
23 that you're asking is whether there are discovery orders that  
24 say that this is geared towards the due process issue for  
25 non-ignition switch plaintiffs, I think we can probably give



1 you that zero set of papers right now.

2 MR. WEISFELNER: Well, Your Honor, I think we can  
3 certainly show you discovery orders and scheduling orders that  
4 go to the issue of whether or not GM knew, should have known,  
5 and when it knew of the defects that are the subject matter of  
6 the fourth amended consolidated complaint.

7 THE COURT: Okay. So I -- that's why I asked you the  
8 questions. And you did identify by recall number it was the --  
9 when I was preparing, I was certainly aware that relatively  
10 close in time to the three recalls that are the -- that help  
11 define the non -- that help define the ignition switch  
12 plaintiffs, the February and March recalls, that there would --  
13 the non-ignition switch plaintiffs include ignition switch  
14 problems. And you've gone through and identified those.

15 MR. WEISFELNER: Not only that, but I think this --

16 THE COURT: I have this question about, well, what's  
17 the next issue? Is it -- is there evidence that Old GM knew  
18 about it and concealed it?

19 MR. WEISFELNER: Your Honor, maybe this is helpful.  
20 On May 4th of this year, Judge Furman entered a memorandum  
21 opinion and order regarding New GM's motion in limine. Their  
22 motion in limine sought to categorically keep out evidence  
23 concerning vehicles with the initial cap ignition switch  
24 defect, including the Valukas report, statement of facts  
25 accompanying the deferred prosecution agreement from the





1 bellwether trials concerning second wave ignition switch  
2 plaintiffs --

3 THE COURT: I think he deferred ruling on it, right?

4 MR. WEISFELNER: No. What they -- what Judge Furman  
5 found was the plaintiffs have not had an opportunity to fully  
6 develop the record on the similarities between the two kinds of  
7 ignition switches.

8 MR. STEINBERG: It was an accident, I guess.

9 THE COURT: Mr. Steinberg, when it's your turn to  
10 speak, speak. And not before that.

11 MR. WEISFELNER: In any event, Judge, what we  
12 think --

13 THE COURT: -- be clear, I'm not going to decide  
14 things that Judge Furman is going to decide.

15 MR. WEISFELNER: But again, Your Honor, I don't think  
16 you need to. And let me tell you why or let me introduce  
17 Mr. Steel who is going to tell you why.

18 THE COURT: You're finally going to let him talk?

19 MR. WEISFELNER: I am going to finally let him talk.  
20 But I'm going to preview for you because I know he's thinking  
21 very carefully, listening very carefully as to what I expect  
22 him to cover. But the whole point of our position is that the  
23 Second Circuit opinion --

24 THE COURT: This is I'm going to tell you what I'm  
25 going to tell you. Then I'm going to tell it to you.



1 MR. WEISFELNER: And then I'm going to tell it to  
2 you.

3 THE COURT: Then I'll tell you what I told you.

4 MR. WEISFELNER: Well, that's what I was taught in  
5 law school. Anyway, the Second Circuit opinion based on the  
6 scope of the sale order changed the due process construct that  
7 Judge Gerber apparently relied on. And you'll hear about the  
8 mandate rule. You'll hear about the wipeout doctrine. You'll  
9 hear about what Mr. Peller had up on appeal and for whose  
10 benefit. And if you need to, you can hear about Rule 60(b) and  
11 all of its different variations: 60(b) itself, 60(b)(5), and  
12 60(b)(6).

13 But for all of those reasons that Mr. Steel will go  
14 into a lot more detail on, our view is that, to again use the  
15 phraseology that Mr. Weintraub uses, the necessity for  
16 demonstrating a due process violation -- and we seem to  
17 conflate these issues -- that there was a due process violation  
18 with regard to the economic loss plaintiffs writ large I think  
19 is almost a foregone conclusion. Whether you suffered any  
20 damage as a consequence, the sort of added element that Judge  
21 Gerber put onto it, I think is sort of an irrelevancy at this  
22 point. The question is what has the Second Circuit reaffirmed  
23 for all of us about the ability of a bankruptcy court order on  
24 a 363 sale that immunizes the purchaser from any of its own  
25 independent non-derivative breaches of duties or violations of



1 law. And as a consequence, we think the whole due process  
2 paradigm is gone. But if Your Honor wants to hear --

3 THE COURT: Only as to independent claims.

4 MR. WEISFELNER: Only as to independent claims. And  
5 that --

6 THE COURT: I understand your argument on that,  
7 but --

8 MR. WEISFELNER: Okay.

9 THE COURT: I'm not saying whether I agree or  
10 disagree. I understand.

11 MR. WEISFELNER: But you understand it. Well, just  
12 to make sure, Mr. Steel will --

13 THE COURT: Mr. Steel --

14 MR. WEISFELNER: -- will address it.

15 MR. STEEL: Thanks.

16 THE COURT: Don't screw up, Mr. Steel.

17 MR. STEEL: Oh, my goodness. The pressure, the  
18 pressure. Howard Steel -- good morning, Your Honor -- of Brown  
19 Rudnick.

20 THE COURT: Maybe Mr. Weisfelner should be asked to  
21 leave the room while you're -- because he'll be jumping up  
22 otherwise when you --

23 MR. STEEL: I'll try to pick up where Mr. Weisfelner  
24 left off, not look over my shoulder, and be brief on this issue  
25 number two. I think the framework is that the fourth amended



1 consolidated complaint asserts independent claims on behalf of  
2 the ignition switch plaintiffs and the exact claims on behalf  
3 of non-ignition switch plaintiffs. That's the state law  
4 consumer protection claims, the fraudulent concealment claims  
5 that Mr. Weisfelner detailed.

6 And Mr. Weisfelner also -- just some housekeeping  
7 here -- detailed that Judge Gerber allowed these claims through  
8 the gate for the ignition switch plaintiffs. And that's at  
9 541 B.R. 104, 130 to -32, where he held that whether New GM had  
10 duties under non-bankruptcy law that formed the basis for  
11 alleged independent claims is to be decided by the MDL court,  
12 Judge Furman.

13 And Mr. Weisfelner also aptly described Judge  
14 Furman's been working hard on this. He's issued three  
15 opinions. And I just wanted to give you the citations for the  
16 record. There's the Cochram (phonetic) summary judgment  
17 opinion at --

18 THE COURT: And I have all of these.

19 MR. STEEL: You have all those? Okay. Great. So  
20 then moving past that, Your Honor said you understood our  
21 position in connection with the Second Circuit's decision  
22 interpreting the sale order as carving out any independent  
23 claims or, in other words, not --

24 THE COURT: Well, Mr. Steinberg's probably going to  
25 disagree with you on that, but --



1 MR. STEEL: Agreed. Agreed.

2 THE COURT: -- I understand your position.

3 MR. STEEL: And Mr. Weisfelner identified that this  
4 is all formulated under 363(f) principles. And I was going to  
5 walk through and cite for the record the Second Circuit's  
6 decision, but Your Honor --

7 THE COURT: Go ahead. Sure.

8 MR. STEEL: -- definitely understands it. I mean,  
9 this is at --

10 THE COURT: Don't assume.

11 MR. STEEL: -- 157. The Second Circuit goes:

12 "Independent claims are based on New GM's  
13 post-petition conduct and are not claims that are  
14 based on the right to payment that arose before the  
15 filing of the petition or that are based on  
16 pre-petition conduct."

17 THE COURT: You have that quote in your brief.

18 MR. STEEL: So you asked --

19 THE COURT: -- that precise quote is in your brief.

20 MR. STEEL: Yeah. So, and you asked that question.  
21 Yeah. Independent claims by their nature are claims based on  
22 post-sale conduct of New GM only, period, stop. And the Second  
23 Circuit held crystal clear these claims are outside the scope  
24 of the sale order's free and clear provision.

25 THE COURT: And that's essentially what Judge



1 Bernstein did in Grumman Olson. He interpreted the sale order  
2 in Grumman Olson as he was dealing with future claimants. But  
3 he carved out and said the sale order doesn't bar them.  
4 Whether one -- someone else might read the sale order  
5 differently, that's how he interpreted it. He interpreted  
6 it -- he interpreted a sale provisions on a sale order, having  
7 in mind the law regarding future claims. I'm going to stop  
8 there.

9 MR. STEEL: Right. And that's entirely on point.  
10 And I think that Tronox will save that. But that's a good  
11 preview for --

12 THE COURT: We'll save Tronox for another day.

13 MR. STEEL: Yeah. Yeah. And when you get into Emoro  
14 (phonetic), I mean, we briefed that on cert.

15 THE COURT: We'll --

16 MR. STEEL: We were denied --

17 THE COURT: -- save Emoro for --

18 MR. STEEL: Yeah. I'm saving it. But I'm just  
19 saying the force of the Second Circuit's logic as you just  
20 framed it is pretty irrefutable.

21 THE COURT: Well, I -- look, I mean, when you come  
22 back to argue about Tronox, I have a hard time seeing how the  
23 Tronox opinion, which is largely a decision that determines  
24 that the Second Circuit lacks appellate jurisdiction because  
25 there was no contempt ruling by the District Court, can in my



1 view supplant, replace, override the Second Circuit's decision  
2 in Motors Liquidation as to what successor liability claims can  
3 be carried forward. But that's for another day. Okay? But I  
4 think --

5 MR. STEEL: And that -- yeah, that's an issue --

6 THE COURT: -- we're not going to talk about Tronox  
7 and Emoro today.

8 MR. STEEL: Agreed. Agreed. And I was just talking  
9 about the point that underpins the Second Circuit's decision  
10 from a policy perspective. Not only is it straight up on  
11 363(f), it just makes a lot of sense because if you're going to  
12 prospectively release future tortious conduct, I mean, that's  
13 well beyond the jurisdiction --

14 THE COURT: Well, I always learned from law school  
15 and years of practice you can't release claims based on conduct  
16 that has not yet occurred.

17 MR. STEEL: Exactly. That creates a moral hazard.  
18 And that was the point where we thought it was a very  
19 thoughtful and well-reasoned decision. And then the Second  
20 Circuit even goes beyond the examples that Mr. Weisfelner  
21 articulated that's in the FACC. The Second Circuit says:

22 "Though the parties do not lay out the whole universe  
23 of possible independent claims, we can imagine that  
24 some claims involve misrepresentations by New GM as  
25 to the safety of Old GM cars."



1 That's what the FACC is asserting. That's what Judge  
2 Gerber, Judge Furman, the Second Circuit, New GM admits is fair  
3 game for the ignition switch plaintiffs. Well, why not the  
4 ignition switch plaintiffs --

5 UNIDENTIFIED: Non-ignition switch plaintiffs.

6 THE COURT: Why not the --

7 MR. STEEL: Why not the non-ignition switch  
8 plaintiffs? Exactly, Your Honor. And our position is that the  
9 Second Circuit decision clearly delineates that the  
10 non-ignition switch plaintiffs should get the same benefits.

11 THE COURT: And so New GM argues that the November  
12 decision and December judgment bar those claims, was -- that  
13 aspect was not appealed and therefore res judicata applies.  
14 And why isn't that correct?

15 MR. STEEL: Right.

16 THE COURT: You have cases like Espinoza, you know,  
17 that sometimes courts do things that are wrong. But if they're  
18 not appealed, you can't collaterally attack it.

19 MR. STEEL: Understood. And our position is that  
20 that doctrine doesn't come into play here, and the way I frame  
21 it is, I mean, I like to use -- and the coinage is was either  
22 asked and answered at the Second Circuit or it's deferred and  
23 still delayed --

24 THE COURT: The asked and answered (indiscernible)  
25 understand that.





1 MR. STEEL: Yeah. So my theme on asked and answered  
2 is that back in April, the non-ignition switch defects --

3 THE COURT: Talk to me about deferred, not asked and  
4 answered. Okay?

5 MR. STEEL: Okay. Well, that -- it all starts in  
6 April, right? So Judge Gerber set up in his decision that the  
7 non-ISD claims would be stayed.

8 THE COURT: He deferred it, that I don't have any  
9 question about, in April, and the June judgment he deferred it.

10 MR. STEEL: Right.

11 THE COURT: The question is whether the November  
12 decision and December judgment decided it.

13 MR. STEEL: Right. And it didn't. Because first, I  
14 mean, there's the practical answer to this where GM is  
15 trumpeting an argument that Judge Gerber painstakingly looked  
16 at the complaints and saw non-ISD and red penned it. That's  
17 not what happened. I think we've established through a day and  
18 a half of proceedings that he ruled on it from a due process  
19 violation lens or paradigm, as Mr. Weintraub is espousing, and  
20 just utilized footnote 70, which said they haven't proved the  
21 due process violation, there's no ability to bring independent  
22 claims under the due process lens.

23 So they were still only stayed. And then the thing  
24 where it goes to asked and answered is concurrently while  
25 those -- the right to prove a due process violation was still



1 in play, well, we had an issue up on the Second Circuit. And  
2 the issue emanates from the April decision where Judge Gerber  
3 decides that you had to prove a due process violation to get  
4 relief from the sale order. The issue was the subject matter  
5 jurisdiction issue. We formulated our statement of issues on  
6 appeals and said, well, is that wrong? Is it just that no  
7 plaintiffs can be barred because the bankruptcy court can  
8 interpret the sale order to bar independent claims? All right?

9 So that was up on appeal. We briefed it. GM lost.  
10 The Second Circuit found that the sale order -- these claims --  
11 all independent claims are outside the scope of the sale order  
12 under their 363 analysis. So the asked and answered part is  
13 the Second Circuit has definitively ruled on the issue. And  
14 that's where we get into, well, the non-ISD's benefit from the  
15 mandate rule, the wipeout --

16 THE COURT: Well, it's not clear to me that the  
17 Second Circuit has decided any issues with respect to  
18 non-ignition switch claims. It's remanded, but they didn't --  
19 it hasn't been decided with respect to it.

20 MR. STEEL: Our position is then that this Court --

21 THE COURT: It may be that the implication that the  
22 opinion is -- that based on its analysis, independent claims,  
23 truly independent claims, the sale order can't -- as the Court  
24 interpreted it, doesn't bar independent claims.

25 MR. STEEL: Right. And our position is that's



1 supported by Manville, and that's supported by Grumman Olson,  
2 Cope (phonetic). I mean, there's a litany of case law that  
3 we've put forth as saying that the Second Circuit correctly  
4 decided, and if there is still an issue here on remand, that's  
5 the spirit and essence of the Second Circuit ruling. And under  
6 the mandate rule, this Court should enforce what is a crystal  
7 clear pronouncement that these claims are outside of the sale  
8 order.

9 THE COURT: Go ahead.

10 MR. STEEL: Despite Mr. Weisfelner's promotion of  
11 long presentation on the mandate rule, the wipeout rule, and  
12 60(b), I think it's -- our papers are pretty clear that each of  
13 these tenors or tenets provide an availability for the Court to  
14 find that the non-ignition switch plaintiffs obtained the  
15 benefit of the Second Circuit decision. And just quickly I  
16 would point the Court to, for the mandate rule, we cited the  
17 Argentina case, the Ivan Boesky litigation, and Coudert  
18 Brothers.

19 And it's just the position that I just articulated  
20 that when you're on remand and the Second Circuit has issued a  
21 decision, the mandate rule says that the bankruptcy court  
22 should enforce the express terms or spirit of the mandate. And  
23 here you have a clear pronouncement that these claims are  
24 outside the scope of the sale order. So we do believe that  
25 those cases support that proposition and application of the



1 Second Circuit opinions of the non-ignition switch defect  
2 plaintiffs.

3 Similarly, the wipeout doctrine is applicable here,  
4 and the line of cases, the Barnett case and the Bank of China  
5 case. And that could actually support the judge's -- this  
6 Court's application of the Second Circuit decision to the  
7 non-ignition switch defect plaintiffs, because the essence of  
8 the wipeout doctrine is to avoid inequitable or even  
9 nonsensical results from lower courts giving an erroneous  
10 ruling continued legal effect.

11 And here you had the Second Circuit come to the  
12 conclusion that any other opinion other than these claims are  
13 being outside of the sale order would technically be absurd and  
14 not in conformance with Chateaugay, so I think the Court has  
15 ample authority under the wipeout doctrine to find that the  
16 earlier rulings putting the successor -- the due process  
17 framework has been wiped out and that the Second Circuit's  
18 controlling precedent now is fully the subject matter  
19 jurisdictional holding set forth in the opinion.

20 Finally, if -- because it is part of the preview  
21 rule, if the Court does find that the November/December  
22 judgments imperils the claims of the non-ignition switch  
23 plaintiffs, their ability to bring independent claims, we do  
24 think this is an appropriate exercise of Rule 60(b) (5) or  
25 60(b) (6). They were timely, two day after the Second Circuit



1 decision. Your Honor marshaled in the parties for setting up  
2 the order to show cause briefing, and we quickly teed up this  
3 issue, so there was no unreasonable delay.

4 I think on 60(b)(5), the key case to look at, I'd  
5 point the Court to the Laury case. That's the Wind Insurance  
6 Agent case, where a claim against an insurance agent for  
7 negligently failing to obtain wind coverage was dismissed  
8 because the Court found that there actually was coverage. Then  
9 on appeal, the Court found there was no coverage and reinstated  
10 the claim for negligently obtaining wind coverage. I think  
11 it's very similar here that the non-ignition switch plaintiffs  
12 should benefit from the Second Circuit's articulation of the  
13 true scope of the sale order.

14 Likewise on 60(b)(6), we cite to the 9/11 terrorist  
15 attack cases, and all these cites are in our brief. Again,  
16 this is -- 60(b)(6) is appropriate when there's inconsistent  
17 results for similarly situated parties. Here, in that case, it  
18 was the application of the Foreign Sovereign Immunities Act.  
19 One court found that it applied; another court found it didn't  
20 apply. Here, you have the same dilemma. You have one court  
21 that potentially, if we're saying that December/November sticks  
22 to bar the non-ISPs, saying that they're out of luck, but you  
23 have the Second Circuit saying that the ISPs are free to assert  
24 the exact same claims. So this is our last argument, as an  
25 alternative, we do think the Court could utilize Rule 60(b)(5)



1 or 60(b)(6) if the Court thinks that the December and November  
2 decisions still bar independent claims of the non-ignition  
3 switch defect plaintiffs.

4 Circling it back, I think in some -- as  
5 Mr. Weisfelner articulated, our position is that the Second  
6 Circuit has established that the sale order cannot bar  
7 independent claims of any stripe and that Judge Gerber, Judge  
8 Furman, the Second Circuit, and even New GM admit that  
9 independent claims of the ignition switch plaintiffs can pass  
10 through the gate, and for non-ignition switch plaintiffs, it's  
11 the exact same claims in the facts. Therefore, the relief  
12 we're looking for here is that the non-ignition switch defect  
13 independent claims, in fact, proceed in front of Judge Furman  
14 without any impediment.

15 THE COURT: Okay.

16 MR. STEEL: That's all I have on issue two.

17 THE COURT: All right.

18 MR. STEEL: Do you want me to dive into issue three,  
19 Your Honor?

20 THE COURT: Sure.

21 MR. STEEL: Okay. Issue three is the used car issue,  
22 the used car purchasers' issue. Again, we hang our hat, Your  
23 Honor, on the Second Circuit's clear language of the decision,  
24 and our position is that it applies equally to ignition switch  
25 plaintiffs and non-ignition switch plaintiffs.



1 THE COURT: Accident, what do -- you think it applies  
2 to economic loss plaintiffs?

3 MR. STEEL: Yes, sir. And the -- sorry.

4 THE COURT: Go ahead, Mr. Steel.

5 MR. STEEL: The Second Circuit again frames this  
6 decision through the lens of 363(f), and they said at 155-56,  
7 claims can only qualify as interest if there's some pre-  
8 petition contact or relationship between the claimant and the  
9 debtor. Accordingly, the used car purchasers' claims fall  
10 outside the scope of the sale order and cannot be enjoined.  
11 There was no --

12 THE COURT: But they don't address what the scope of  
13 any used car purchasers' claim would be, and so the part -- I  
14 said this early, the part that I have some problem with is  
15 trying to expand the rights of the used car purchaser,  
16 certainly for economic loss claims, beyond what the seller of  
17 the vehicle could have asserted. For accident plaintiffs, I  
18 understand it. Your argument is they're future claimants,  
19 they're not bound. But that argument, I don't see how that  
20 works for economic loss plaintiffs. You acquired whatever --  
21 when you acquire the car, you acquire whatever rights the  
22 seller has.

23 MR. STEEL: Right.

24 THE COURT: Do you disagree with that?

25 MR. STEEL: No. Generally, I think that's a fair



1 proposition, but let me try to explain why I don't think it's  
2 applicable here. Here the Second Circuit -- Mr. Weintraub I  
3 think mentioned this -- for lack of a better word, eviscerated  
4 Judge Gerber's decision on the used car purchasers in its  
5 entirety. It's a strange section of the --

6 THE COURT: Okay. I don't have this -- I don't have  
7 it. I could just decide on my own --

8 MR. STEEL: Right.

9 THE COURT: -- that a used car purchaser can't -- on  
10 economic loss claims, can't have any greater rights than the  
11 seller had. Do you agree with that proposition or not?

12 MR. STEEL: I agree. I --

13 THE COURT: Okay.

14 MR. STEEL: -- agree with the proposition, but I  
15 don't think it's applicable for this issue that is in front of  
16 Your Honor.

17 THE COURT: Well, tell me why. That's what I -- all  
18 right. I'm going to --

19 MR. STEEL: Right. I think that --

20 THE COURT: -- give you a chance to tell me why it  
21 doesn't apply here.

22 MR. STEEL: Well, because the issue that you're  
23 looking at, I guess again there's a modulation I think between  
24 what a successor liability claim that could be raised by a used  
25 car purchaser, so say a non-ISD claimant sells his car. He's





1 not going to have greater rights to bring a successor liability  
2 claim than the original owner. The original owner would have  
3 to prove the due process violation and be able to bring a  
4 successor liability claim.

5 We're focused on independent claims, and the Second  
6 Circuit sets the right outlook there when it says that you're  
7 not focusing on the claim. You're focused on the claimant, and  
8 the claimant has no relationship with new or Old GM.

9 THE COURT: But it doesn't say that the claimant has  
10 any greater rights than -- on economic loss than the party who  
11 sold it to them. There's nothing in the opinion that says  
12 that.

13 MR. STEEL: Right. It only says you're not enjoined  
14 by the seller. Right. So I'm -- you don't necessarily need to  
15 decide this issue on rights of the original purchaser or the  
16 used car purchaser. It's just whether the sale orders apply to  
17 those claims.

18 THE COURT: But I think I do. I think I do because  
19 if I conclude that, okay, used car purchaser can go ahead and  
20 assert claims, but the bankruptcy court order bars them from  
21 asserting claims for rights any greater than the seller had.  
22 I'm not going to leave that to a state court somewhere else in  
23 the country if I conclude that that's what the bankruptcy --  
24 the effect of the bankruptcy is.

25 MR. STEEL: Yeah.



1 THE COURT: I'm not there yet, Mr. Steinberg, on the  
2 whole used car issue. I want to hear about it. But at a  
3 minimum, I think I haven't heard you -- on economic loss  
4 claims, a used car purchaser can't acquire any greater rights  
5 than the seller had.

6 MR. STEEL: Right. Because I don't think we are  
7 taking that position. What we're trying to -- the position  
8 that we're taking is that if the seller had an independent  
9 claim and then sold the car to the used car purchaser, that  
10 can't be blocked by the sale order. So we're not saying they  
11 get any greater rights. We're just --

12 THE COURT: Well, if I accept the argument that the  
13 sale order can't bar independent claims, full stop, and I'm not  
14 there yet. But if that were -- that would take care of this  
15 issue.

16 MR. STEEL: Right. So my first argument --

17 THE COURT: And I don't know what your argument is  
18 about economic loss claims and New GM. I understand what  
19 Mr. Weisfelner said about tell me what the allegations of the  
20 independent claims are. But I don't see how that impacts on  
21 economic loss claims.

22 MR. STEEL: Okay. So our position -- let me give it  
23 a try. Our position is, again, the scale and scope of the  
24 Second Circuit decision, right, New GM --

25 THE COURT: Don't talk -- I don't want to hear about



1 the Second Circuit decision.

2 MR. STEEL: Yeah, okay.

3 THE COURT: Tell me what you believe the independent  
4 claims on behalf of used car purchasers, what's their -- what  
5 are their allegations?

6 MR. STEEL: Well, it's the same as the --

7 THE COURT: Economic loss claims by used car  
8 purchasers, what -- post-sale used car purchasers, what's their  
9 claim?

10 MR. STEEL: Right. The diminution in the value or  
11 the degradation of the benefit of the bargain at the time of  
12 the purchase, so they have the same sort of claims as  
13 articulated in the fact for fraudulent concealment for  
14 misrepresentations, for breach of the consumer protections. I  
15 think we can appreciate that they're not getting any better  
16 rights than the original purchaser, but they're also not being  
17 foreclosed from bringing those same independent claims.

18 THE COURT: All right. Go ahead.

19 MR. STEEL: All right. And you, Your Honor, just  
20 articulated the most viable basis is that it's all conditioned  
21 on your ruling on issue two. If you rule like you just  
22 articulated, that the non-ignition switch defect plaintiffs can  
23 bring independent claims, period, end of story, the used car  
24 purchasers who bought and purchased cars with a non-ignition  
25 switch defect likewise can bring those independent claims.



1 THE COURT: Go ahead.

2 MR. STEEL: The last vein that -- of mine on this is  
3 the future claim. The interpretation that these claimants are  
4 free to proceed because the identity of the used car purchasers  
5 were neither known nor ascertainable at the time of the sale  
6 and therefore couldn't have been provided constitutionally  
7 adequate notice, Mr. Weintraub touched on this as the Grumman  
8 Olson line, the Cope line, Chateaugay. And I think this is  
9 what the --

10 THE COURT: None of those deal with economic loss  
11 claims, do they?

12 MR. STEEL: Not directly. I think they were personal  
13 injury.

14 THE COURT: Well, what's this not directly? They  
15 don't deal with it, correct?

16 MR. STEEL: To my knowledge, correct.

17 THE COURT: It's one thing to say that future claims  
18 for personal injury or wrongful death or property damage can't  
19 be barred for future claimants. But it seems to me wholly  
20 different to deal -- and I'm not sure how exactly how to deal  
21 with it, but the economic loss claims seem very different to  
22 me.

23 MR. STEEL: I hear you but --

24 THE COURT: Do you have any cases that deal with  
25 solely economic loss claims that specify when or how or the



1 scope of those claims going forward after a sale, whether  
2 they're barred by a sale order or not?

3 MR. STEEL: Well, I think we would rely on the Second  
4 Circuit opinion. I know you said don't address it, but the  
5 Second --

6 THE COURT: Well, at that point --

7 MR. STEEL: Yes.

8 THE COURT: -- I wanted an answer with that regard.  
9 But what in the Second Circuit opinion --

10 MR. STEEL: Well, that identified in their discussion  
11 on the used car purchaser claims that they said there's  
12 enormous practical and perhaps constitutional problems with  
13 enjoined claims of claimants with no relationship with the  
14 debtor. They don't make a distinction between people that were  
15 subsequently in a personal -- in an accident versus having  
16 economic loss. They held completely on the relationship with  
17 the debtor.

18 THE COURT: What page are you looking at in the  
19 opinion of the used car purchasers?

20 MR. STEEL: This is all in 157 of the decision. They  
21 said more -- in more depth, as of the petition date, there was  
22 an unknown number of unknown individuals who would one day  
23 purchase Old GM vehicles second hand. There could've been no  
24 contact or relationship actual or presumed between Old GM and  
25 these specific plaintiffs. Accordingly, the sale order cannot



1 be read to cover their claims. They don't make any distinction  
2 between accident and economic loss claims.

3 THE COURT: Okay.

4 MR. STEEL: They just find that they're  
5 non-creditors, that they don't have claims under 101 that can't  
6 be affected by the sale order free and clear. So we're pretty  
7 reliant on the 363(f).

8 THE COURT: Okay.

9 MR. STEEL: That's basically what we have, Your  
10 Honor.

11 THE COURT: Thank you.

12 MR. STEEL: Thank you.

13 THE COURT: Mr. Peller, you can argue.

14 MR. PELLER: Good morning, Your Honor. I'm Gary  
15 Peller representing the Elliott --

16 THE COURT: You have 30 minutes until the afternoon.  
17 Go ahead.

18 MR. PELLER: The Elliott, Sesay, and Bledsoe  
19 plaintiffs. Before I get started, I didn't want to forget, I  
20 want to disassociate myself from Mr. Weisfelner's statement  
21 that Judge Furman has set forth the due process issues for  
22 determination. I don't believe that's correct. The discovery  
23 orders encompass discovery for -- that's listed by recalls, but  
24 the issues to be decided by that discovery, I believe in my  
25 review of the Judge Furman's orders, nowhere contained there.



1 I believe that Judge Furman is expecting this Court to resolve  
2 the question whether non-ignition switch plaintiffs may assert  
3 successor liability claims because of a due process violation  
4 or not.

5 THE COURT: May I ask you this, Mr. Peller? Is there  
6 a transcript? Is there an order? You obviously have a  
7 disagreement with Mr. Weisfelner on this issue, and I asked him  
8 whether there are any orders. I would expand it to transcript.  
9 Is there anything that you'll be able to point to in the record  
10 in the district court, in an order or a transcript, that  
11 indicates that Judge Furman is not going to decide the due  
12 process issue?

13 MR. PELLER: No, Your Honor, except the general drift  
14 of all of his decisions saying he's waiting for Judge Gerber  
15 and --

16 THE COURT: Well, a general drift doesn't do a lot.

17 MR. PELLER: Well, no, there's nothing -- the  
18 discovery is going forward on those defects and --

19 THE COURT: Well, why is the discovery going forward  
20 if he is not going to be addressing the issue?

21 MR. PELLER: Because the non-ignition switch  
22 plaintiffs have been permitted in the fourth amended  
23 consolidated complaint and in the Elliott, Sesay, and Bledsoe  
24 complaints to assert independent claims under the Second  
25 Circuit decision. We've amended our complaints to comply with



1 the Second Circuit decision. This independent claims are going  
2 forward.

3 THE COURT: So what does Old GM's knowledge of  
4 non-ignition switch defects have to do with whether you can  
5 assert independent claims?

6 MR. PELLER: They're not -- the -- Judge Furman is  
7 not deciding whether you can assert independent claims or not.  
8 That was decided by the Second Circuit. Judge Furman's  
9 deciding -- Judge Furman's conducting discovery so those claims  
10 can go forward, what's the nature of the claim, when did the  
11 defendants learn, how did they learn, et cetera, and some of  
12 that necessarily involves New GM learning from Old GM about  
13 defects.

14 THE COURT: I make the same invitation to you. If  
15 there are orders by Judge Furman or transcripts of hearings  
16 before Judge Furman that address whether Judge Furman is going  
17 to be presented with and asked to decide the due process issues  
18 with respect to non-ignition switch plaintiffs, file it. I  
19 want to see it.

20 MR. PELLER: Yes, sir. I don't believe there are,  
21 but I just wanted to disassociate myself from the  
22 representation that there were.

23 Your Honor, the -- as I understand New GM's arguments  
24 with respect to the Elliott, Sesay, and Bledsoe plaintiffs, who  
25 I represent, we clearly did appeal the April decision and the





1 June judgment on behalf of both ignition switch and  
2 non-ignition switch plaintiffs. There's no question that we  
3 are not precluded by a failure to appeal. Not only did we  
4 appeal, but we won on virtually every issue we appealed from.  
5 So as I understand New GM's argument, it's that even though we  
6 appealed from the April and June judgment, we are nevertheless  
7 bound by our failure to appeal from the November 15th decision  
8 and the December 15th judgment.

9           That is incorrect, Your Honor, because the November  
10 15th decision and December 15th judgment were merely  
11 enforcements of and applications of the April and June rulings.  
12 There was no expectation that anything new was going to come  
13 in, but, in fact, Judge Furman's request for the bellwether  
14 claims came in as an additional issue, and because New GM was  
15 able to serve its September -- the September scheduling order,  
16 new parties came in.

17           But the very purpose of the post-judgment  
18 proceedings, the November/December proceedings, was -- and I'll  
19 quote from the beginning of the November decision:

20           "The Court must now determine the extent to which the  
21 April decision and judgment bar particular claims and  
22 particular allegations and complaints in court in  
23 which claims are asserted against New GM, then  
24 continuing. The extent to which by reason of the  
25 first issues or other matters allegations and



1 particular claims" --

2 THE COURT: Just slow down a little bit.

3 MR. PELLER: I'm sorry, reporter.

4 THE COURT: It's not a reporter. It's just the voice  
5 recorder here, but it's me who needs you to slow down.

6 MR. PELLER: I'm sorry, Your Honor.

7 "The extent to which allegations and particular  
8 complaints run afoul of the April decision and  
9 judgment and thus must be stricken before affected  
10 actions may proceed."

11 So Judge Gerber made the general rulings. He said  
12 independent claims for ignition switch plaintiffs can go  
13 forward. Successor liability claims can't go forward for  
14 anyone. Independent claims for non-ignition switch cannot go  
15 forward. Those claims remain stayed. That was all decided in  
16 April and June.

17 Then according to the June judgment, the parties were  
18 permitted to file no strike pleadings or objection pleadings  
19 saying that, given this order, nevertheless, these claims can  
20 go forward. I filed on behalf of my client, so did the other  
21 plaintiffs, and that developed into the marked pleadings  
22 process. This goes through. This doesn't go through. But all  
23 that was application of what was already on appeal.

24 To the extent what's already on appeal gets reversed,  
25 the application and enforcement of those rulings also get



1 reversed. It would've been redundant for us to appeal the  
2 November and December judgments when we already had the very  
3 issues that we objected to on appeal, the independent claims  
4 issue, the used car purchasers issue, and the due process issue  
5 with respect to non-ignition switch plaintiffs.

6 Part of the confusion I think, Your Honor, is that  
7 we've been talking about the appeal as only referring to the  
8 April decision and the June judgment. When I came into the  
9 case, I called New GM and I was immediately told if you file  
10 anything concerning a vehicle manufactured by Old GM, you will  
11 be in contempt of court. So I sat down with my clients and we  
12 figured out what are we going to do about this. And we read  
13 Mansville and other relevant opinions and decided, well, we  
14 would rather go faster than have our successor liability claim.  
15 We're going to file our complaints exclusively with independent  
16 claims and have no jurisdiction we thought of the bankruptcy  
17 court to stop us.

18 So according to the procedures that were then in  
19 place, we filed our complaints. New GM moved to enforce  
20 against us. We filed no stay pleadings in each of the cases.  
21 And in those no stay pleadings, we argued that the sale order  
22 should not be construed to cover independent claims.  
23 Independent claims are beyond the subject matter jurisdiction  
24 of a bankruptcy court, and therefore the -- all our complaints  
25 should be free of the stay.



1           Those no stay pleadings were each denied by Judge  
2 Gerber, and we appealed each of those denials. We also, after  
3 the June judgment on behalf of the Bledsoe plaintiffs, filed a  
4 motion for reconsideration where we explicitly said that Judge  
5 Gerber's construction of the sale order to make independent  
6 claims retained liabilities of Old GM was absurd. That was a  
7 wrong construction, and that also was denied. We also appealed  
8 from that.

9           So we had repeatedly argued in all our cases on  
10 behalf of ignition switch and non-ignition switch claimants  
11 that the sale order did not cover, could not constitutionally  
12 cover, and should not be construed to cover independent claims.

13           THE COURT: Are all of your clients accident  
14 plaintiffs?

15           MR. PELLER: No, I only have two accident plaintiffs,  
16 Your Honor. All my non-ignition switch plaintiffs are  
17 non-accident economic loss claimants.

18           So New GM has set up its argument as if the November  
19 and December proceedings, rulings, were just completely  
20 separate from the April and June rulings, as if new issues were  
21 being presented. It's just not true, non-ignition switch  
22 claims, that the sale order did not cover and could not  
23 constitutionally cover independent claims were clearly before  
24 Judge Gerber. In fact, the June judgment lists in the appendix  
25 the various claims, the various categories of complaints that



1 are covered by the judgment, and one of the categories is non-  
2 ignition switch claims.

3           So Judge Gerber clearly did rule on non-ignition  
4 switch claims. He ruled that independent claims for -- by  
5 non-ignition switch plaintiffs could not be asserted because he  
6 construed the sale order to encompass those claims and held  
7 that and deferred as to whether, like the ignition switch  
8 plaintiffs, they also had a due process violation. He also  
9 ruled that used car purchasers were covered on the idea that  
10 they couldn't have any greater rights than those who they  
11 purchased from. We objected to that on the basis that they are  
12 future claims, and we won that as well.

13           So the image that Judge Gerber just deferred on all  
14 the non-ignition switch claims arguments is incorrect.  
15 Non-ignition switch claims arguments, some of our most  
16 important were contained -- were made well before June, were  
17 contained in the June judgment, and we properly appealed from  
18 those rulings. It would've been redundant and absurd to appeal  
19 from the November/December judgments that were mere  
20 implementations of that. In fact, Your Honor, to the extent  
21 that the November and December judgments would've decided new  
22 things, the Court wouldn't have had jurisdiction. The filing  
23 of a notice of appeal withdraws the jurisdiction from the lower  
24 court of the appeal except for enforcement of the judgment.  
25 That's all that was going on, again, except for the expansion



1 for the bellwether issue that Judge Furman had asked to be  
2 addressed regarding punitive damages. In fact --

3 THE COURT: Mr. Peller, did you raise before Judge  
4 Gerber on behalf of non-ignition switch economic loss  
5 plaintiffs the due process argument?

6 MR. PELLER: Yes, Your Honor, we raised the due  
7 process argument. Our understanding was, and I think this is  
8 the understanding until -- as my fellow counsel said, GM kind  
9 of pivoted and has come up with kind of a new narrative of what  
10 happened. Everybody's understanding was Judge Gerber was --  
11 ruling on the stipulated record that was available through the  
12 Valukas report and some other sources, the parties agreed on  
13 these facts. He was going to make his ruling on due process  
14 and the other claims on those facts. It would go up on appeal.  
15 The appeal would clarify the issues. And then once the appeal  
16 was over, then we would be dealing with whether the non-  
17 ignition switch plaintiffs needed to make a due process  
18 violation or -- and what --

19 THE COURT: Let me ask a question. You said -- and I  
20 don't have the exact words -- that Judge Gerber did not defer  
21 on oral non-ignition switch arguments.

22 MR. PELLER: That's right.

23 THE COURT: Okay. And what I'm specifically trying  
24 to understand is whether he was presented with non-ignition  
25 switch plaintiff due process arguments. Did he defer it? Did



1 he decide it?

2 MR. PELLER: We argued that the non-ignition switch  
3 plaintiffs' due process rights had been violated by a lack of  
4 notice. That was our assertion and allegation. It was clear  
5 to everybody involved that in order to litigate, that much  
6 discovery would be needed. These non-ignition switch, there's  
7 a bunch of different defects. There's maybe 60 different  
8 defects that we're talking about, power steering, door module,  
9 air -- side airbags, ignition switch related but not  
10 technically ignition switch, et cetera. There was going to be  
11 a load of discovery that was going to have to be done to  
12 support those claims so the --

13 THE COURT: Okay. What --

14 MR. PELLER: We -- I didn't ask for that to be ruled  
15 on. I did ask, Your Honor, prior to the entry of the June  
16 judgment, for an opportunity to make other objections to the --  
17 GM's motions to enforce besides the ones that had been  
18 considered in the 2014 threshold issues. Judge Gerber denied  
19 that request to make other objections. He made very clear, in  
20 I think it was his fourth threat, to hold me in contempt, that  
21 he'd heard enough from me.

22 So the flavor here, Your Honor, was not that we were  
23 holding back. The flavor was Judge Gerber just wanted to deal  
24 with the ignition switch, the due process issues. He would  
25 defer on the question of whether the non-ignition switch



1 plaintiffs had a similar due process issue in that Old GM  
2 knew --

3 THE COURT: Because --

4 MR. PELLER: -- but not on the question of the  
5 construction of the sale order and its application to used car  
6 purchasers.

7 THE COURT: And what I am -- want to know, is there a  
8 transcript or an order or something in one of Judge Gerber's  
9 opinions where he says I'm deferring on whether there was a due  
10 process violation that affects the non-ignition switch  
11 plaintiffs?

12 MR. PELLER: That's the way I understand footnote 70,  
13 Your Honor, but except for the -- except for what the Court's  
14 already looked at, I'm not aware of any.

15 THE COURT: So you're -- that part of your argument  
16 is based on footnote 70.

17 MR. PELLER: Yes.

18 THE COURT: Okay. Go ahead.

19 MR. PELLER: And my experience in the whole  
20 proceedings. I mean, you know --

21 THE COURT: Well, I -- you know, I wasn't -- your --

22 MR. PELLER: I understand.

23 THE COURT: I have to decide -- I'm looking at  
24 transcripts. I'm looking at decisions. I'm looking at  
25 judgments and a lot of arguments from counsel.





1 MR. PELLER: Yeah, I understand, Your Honor. I'm  
2 just trying to give you the narrative was that, because of the  
3 Valukas report, those issues could be decided on stipulated  
4 facts. Everybody understood there was no parallel to the  
5 Valukas report for non-ignition switch plaintiffs. That  
6 couldn't be decided on stipulated facts. That would have a  
7 whole mess of discovery and GM coming in here now and arguing,  
8 oh, they wanted to go through discovery in the fall of 2015 is  
9 disingenuous, Your Honor. They were wanting to avoid discovery  
10 in this court since I've been in the case.

11 THE COURT: Go ahead.

12 MR. PELLER: The other point, Your Honor, is that if  
13 New GM's argument is right that the failure to appeal the  
14 November and December decision and judgment was preclusive, res  
15 judicata, for my clients, even though we appealed the earlier  
16 judgment, why didn't they tell the Second Circuit that?  
17 Because they ended up rendering moot a whole mess of Second  
18 Circuit work on non-ignition switch plaintiffs.

19 The -- we made very explicit in the Second Circuit,  
20 we are here for the ignition switch plaintiffs but also for  
21 non-ignition switch plaintiffs. These are our arguments for  
22 non-ignition switch plaintiffs, and we won those arguments.  
23 The oral argument didn't occur until months after the  
24 November/December judgments.

25 If New GM really thought that our failure to appeal,



1 and our time for appeal had run out by then, mooted our ability  
2 to challenge things in the Second Circuit, then they shouldn't  
3 have -- they should have told the Second Circuit that. This is  
4 a late -- a very recently devised narrative that New GM has  
5 made up, and it seems absurd, Your Honor. We appealed and we  
6 won the appeal with respect to ignition switch and non-ignition  
7 switch claims with respect to independent claims not being part  
8 of the sale order, the sale order being constructed not to  
9 include independent claims, and with respect to the future  
10 claims of used car purchasers.

11 Another comment Mr. Steinberg and his -- at the last  
12 hearing also stated, I think also disingenuously, that New GM  
13 has never had a problem with independent claims. It's always  
14 been open to independent claims if they're truly independent.  
15 That's just not true, Your Honor. New GM has fought, fought  
16 every no stay pleading I filed seeking only to assert  
17 independent claims. And the very cross-appeal of New GM to the  
18 Second Circuit was appealing from Judge Gerber's ruling  
19 allowing independent claims of ignition switch plaintiffs to go  
20 forward, so I hope you take with a grain a salt this  
21 representation that they've never had any problem with claims  
22 -- with independent claims going forward.

23 Your Honor, I think that is that it was very  
24 significant that you asked Mr. Weisfelner who he represents  
25 because I think that's a very important thing to keep in mind.



1 We've been talking about categories of plaintiffs, non-ignition  
2 switch plaintiffs, ignition switch plaintiffs, but nobody here  
3 -- none of us lawyers represent any categories of plaintiffs.  
4 Mr. Weisfelner, incorrectly I think, said that lead counsel  
5 represent the punitive class members. Nobody represents  
6 punitive class members in a class actions.

7           Until the class is certified, those lawyers only  
8 represent the individuals that they retained. In this case  
9 what the means is that the lead counsel and then by virtue the  
10 designated counsel that they've retained in this proceeding,  
11 they represent the named plaintiffs in the second amended  
12 consolidated complaint, which was what was the subject of the  
13 June judgment, or the fourth amended consolidated complaint  
14 now. They represent those individuals. The reason I'm  
15 pointing this out, Your Honor, is I think it's very important.

16           If you do find that the failure of designated counsel  
17 to appeal the June judgment in the April decision on behalf of  
18 non-ignition switch plaintiffs precludes non-ignition switch  
19 plaintiffs, I hope that -- I assume that you will be careful to  
20 delineate that the only people that are precluded by that  
21 failure to appear -- to appeal are the ones who actually were  
22 represented and appeared in the proceeding leading up to that.  
23 So my clients aren't precluded. We appealed. The clients  
24 represented by designated counsel were only the named  
25 plaintiffs in the second amended complaint. No one else can be



1 precluded if they didn't participate, and now --

2 THE COURT: The law, the case can apply, and if I  
3 render a ruling that covers the named plaintiffs in the MDL and  
4 that would ordinarily be bind -- not binding, it would --  
5 ordinarily the persuasive authority to apply to everyone else  
6 who's similarly situated.

7 MR. PELLER: Absolutely. But Judge Gerber's rulings  
8 on non-ignition switch plaintiffs cannot be binding authority  
9 or persuasive authority in any way. They were reversed.

10 THE COURT: Well, some of it was reversed. Not all  
11 of it was reversed.

12 MR. PELLER: But the -- his holding to construe the  
13 sale order to encompass independent claims was explicitly  
14 reversed.

15 THE COURT: I think -- are there any other points? I  
16 think I got the independent claims arguments down.

17 MR. PELLER: Okay. The other -- another point, and  
18 I'll -- this is my last point on issue number two, threshold  
19 issue number two, is Mr. Steinberg also represented at the last  
20 hearing that in the November and December proceedings, Judge  
21 Gerber went through the Peller-marked complaints and decided  
22 that independent claims had not been stated. That's absolutely  
23 incorrect, and there's no need to quibble over it.

24 I'll just point the Judge -- the Court to Judge  
25 Gerber's November decision where he goes through the Peller



1 complaint, says that they do assert independent claims, take  
2 out all the language about Old GM, and these are valid  
3 independent claims. Even though they're valid independent --

4 THE COURT: Take out language about Old GM, so he  
5 didn't find that everything you said in the complaint was okay.

6 MR. PELLER: Yes, he said the independent claims, the  
7 way the claims were stated was okay, but I can't refer to  
8 anything New GM -- Old GM did.

9 THE COURT: That seems to me to say that he didn't  
10 find that your complaint was -- passed the threshold. It would  
11 pass the threshold if you remove the references to Old GM.

12 MR. PELLER: Well, then we did remove them, and we  
13 filed --

14 THE COURT: So don't tell me he said that your  
15 complaint was okay. He didn't.

16 MR. PELLER: He said that the independent claims  
17 asserted on behalf --

18 THE COURT: If you removed certain language.

19 MR. PELLER: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. PELLER: Okay. And then --

22 THE COURT: I get your point.

23 MR. PELLER: -- what he said about the independent  
24 claims for non-ignition plaintiffs was that they must be  
25 removed not because they mention Old GM but because my June



1 ruling said non-ignition switch plaintiffs can assert  
2 independent claims. It was all based on the June ruling. It  
3 wasn't based on any new finding of due process or any new  
4 litigation that occurred as to whether non-ignition switch  
5 plaintiffs presented a due process violation.

6 Your Honor, if I could move to question number three,  
7 the used car purchasers.

8 THE COURT: Do you represent used car purchasers?

9 MR. PELLER: I do, Your Honor.

10 THE COURT: Okay.

11 MR. PELLER: I have 12 clients, Your Honor, in a kind  
12 of mix of boxes as we refer to them. You asked Mr. Steel  
13 whether he agreed that a purchaser could have no greater rights  
14 than the seller from whom they purchased --

15 THE COURT: Economic loss claimants.

16 MR. PELLER: Economic loss claimants. I disagree  
17 with the answer Mr. Steel gave to you. The reason that a  
18 purchaser can have greater rights than the seller, Your Honor,  
19 is because under the Second Circuit ruling, the purchaser as a  
20 future claimant is not bound by any of the restrictions of the  
21 bankruptcy process. The seller, to the extent the seller had a  
22 relationship with Old GM, is -- and to the extent they were  
23 notified properly, et cetera, and in some situations  
24 publication notice will be sufficient, that seller is bound by  
25 the bankruptcy restriction including the Chapter 7 restriction



1 on the recovery of punitive damages.

2 But what the Second Circuit said is despite whatever  
3 might be true of the seller and the seller's rights, the buyer  
4 is simply not bound by any of the restrictions on recovery from  
5 Old GM that the seller might have had by virtue of being a  
6 creditor of Old GM.

7 THE COURT: Let me -- show me the language, tell me  
8 the language in the Second Circuit opinion that supports what  
9 you just told me.

10 MR. PELLER: Well, I would just refer the same  
11 language that Mr. Steel said. The language is that because  
12 they were -- they had no contact with Old GM, they were not a  
13 creditor of Old GM. Since they were not a creditor of Old GM,  
14 they are not barred by the sale order or by any of the  
15 proceedings that Old GM went through. They are simply  
16 independent of the bankruptcy rulings.

17 THE COURT: Totally outside of bankruptcy.

18 MR. PELLER: Yes.

19 THE COURT: A seller can't convey more than he or she  
20 has. I don't think it has anything to do with bankruptcy.

21 MR. PELLER: But the Second Circuit said --

22 THE COURT: How can the seller -- stop -- how does  
23 the seller convey more of its bundle of rights than he has --  
24 he or she has?

25 MR. PELLER: Because the seller might have a



1 particular disability from suing a particular defendant that  
2 the buyer doesn't have. That's what we have here, Your Honor.  
3 The seller has a particular disability because he was a  
4 creditor of an insolvent debtor, but the buyer is not a  
5 creditor under the Second Circuit opinion and therefore --

6 THE COURT: (Indiscernible - cross talk).

7 MR. PELLER: -- the buyer is not governed by any of  
8 the restrictions --

9 THE COURT: Take it out of insolvency. What is it  
10 that permits a seller to convey economic rights greater than  
11 the seller has? Do you have a case that supports you?

12 MR. PELLER: Your Honor, the --

13 THE COURT: Do you have a case that supports you, yes  
14 or no?

15 MR. PELLER: Your Honor, I'm trying to think through  
16 exactly what you're asking. I'm trying to understand, Your  
17 Honor.

18 THE COURT: Let me make it crystal clear, if you  
19 didn't understand my question.

20 MR. PELLER: Okay.

21 THE COURT: Forget about bankruptcy. If I sell you  
22 my car, can I convey to you any rights greater than the rights  
23 that I have?

24 MR. PELLER: Yes, Your Honor, you could've signed a  
25 release with the manufacturer that I'm not subject to. Of





1 course, Your Honor, different parties have different  
2 relationships, different claims, and different defendants, and  
3 particularly what we're talking about here is a particular  
4 disability that a creditor --

5 THE COURT: Do you have some basis that supports what  
6 you've just told me?

7 MR. PELLER: No, Your Honor, I'm using reasoning.

8 THE COURT: Probably faulty reasoning.

9 MR. PELLER: That's up to you to decide, Your Honor.  
10 I --

11 THE COURT: That's why I ask whether you have -- it's  
12 one thing to make an argument, but it's another thing to give  
13 me case law that supports your argument, and your answer is you  
14 don't have any, right?

15 MR. PELLER: Your Honor, we believe, as Mr. Steel --

16 THE COURT: Do you have any case law to support your  
17 argument?

18 MR. PELLER: The Second Circuit decision in General  
19 Motors, Your Honor.

20 THE COURT: Okay. Show me the -- I want -- whether  
21 Mr. Steel read it or not, point me to the precise language in  
22 the Second Circuit opinion that gives used buyers claims for  
23 economic loss greater than what the seller of the vehicle has.

24 MR. PELLER: There's not explicit language, Your  
25 Honor. It's the implication of the holding that used car



1 purchasers are not in any way bound by the bankruptcy  
2 proceedings since they weren't creditors of the --

3 THE COURT: I don't think it depends on the  
4 bankruptcy proceeding.

5 MR. PELLER: Okay.

6 THE COURT: That's my point.

7 MR. PELLER: Okay, Your Honor. Your Honor, I don't  
8 believe I'm going to convince you, and I'd like to move onto  
9 issue number four, punitive damages.

10 THE COURT: Yes, please.

11 MR. PELLER: The punitive damage issue came in  
12 because of the press of the bellwether trials that were coming  
13 up in front of Judge Furman, and one part of the punitive  
14 damage ruling was that this was not an assumed liability, and  
15 none of the plaintiffs appealed that. But the rest of the  
16 punitive damages holding, again, depended on the June judgment  
17 that was reversed so that Judge Gerber had held that successor  
18 liability claims on behalf on ignition switch plaintiffs could  
19 not go forward under his April 15th ruling, so, of course,  
20 punitive damages for successor liability also could not go  
21 forward.

22 Once the predicate for that holding is removed by the  
23 reversal in the Second Circuit, the Second Circuit says, you  
24 made a mistake, no, successor liability claims can go forward  
25 for ignition switch plaintiffs, then that removes the predicate



1 for the bar on punitive damages with respect to those claims.

2 THE COURT: Do you agree with everything in the  
3 Second Circuit decision that addresses whether punitive damages  
4 for ignition switch plaintiffs would've established a due  
5 process violation, that punitive damages are available?  
6 There's nothing in the opinion that addresses that specific  
7 issue.

8 MR. PELLER: That's right, Your Honor.

9 THE COURT: Okay. So go back to first principals  
10 then. How does -- what is it that gives rise to -- if no --  
11 why don't I start again? Do you agree that no punitive damages  
12 could be recovered from the insolvent debtor, Old GM?

13 MR. PELLER: In bankruptcy proceedings or -- yes.

14 THE COURT: Okay. And do you have a case that would  
15 expose a buyer either on assumed liability -- there it's  
16 expressly provided in the contract or on a successor liability  
17 theory that would expose the successor to a punitive damage  
18 claim where the entity from which it acquired would not be  
19 subject to punitive damages?

20 MR. PELLER: Well, that's our case, Your Honor. I  
21 mean, I think we're going back to the discussion we just had.

22 THE COURT: Then do you agree then that this is a  
23 question of first impression? You have no authority that  
24 decides the issue. The Second Circuit didn't decide it, and  
25 you don't have -- other than what we're dealing with now, you



1 have no authority to support that New GM is subject to punitive  
2 damages on successor liability claims.

3 MR. PELLER: I don't, Your Honor.

4 THE COURT: Okay.

5 MR. PELLER: Except for the general holding of the  
6 Second Circuit that these claims --

7 THE COURT: (Indiscernible - cross talk).

8 MR. PELLER: -- are outside of the bankruptcy  
9 process, they're outside of the sale order.

10 THE COURT: Do you have any case law outside of  
11 bankruptcy that would make an acquirer of assets subject to a  
12 punitive damage liability when its seller could not be?

13 MR. PELLER: I don't, Your Honor, but if the Court  
14 doesn't mind, I'd like to --

15 THE COURT: No, I --

16 MR. PELLER: Okay.

17 THE COURT: -- we've -- I've got stacks of briefs.

18 MR. PELLER: Okay.

19 THE COURT: Everybody has taken their best shot at  
20 it.

21 MR. PELLER: So --

22 THE COURT: But what I've been looking for, I haven't  
23 found, is one way or the other. I'm giving you a hard time,  
24 but I've given Mr. Steinberg a hard time about it as well. I  
25 don't have any guiding case law, including the Second Circuit



1 opinion, that addresses the issue of whether -- in here, it's  
2 whether New GM can be subject to punitive damages on successor  
3 liability claims.

4 MR. PELLER: I understand, Your Honor, and without  
5 belaboring it, we believe that -- or I believe that the general  
6 principle on behalf of my clients is that if a party's claim is  
7 not within the scope of the sale order, then it's not  
8 restricted by any of what would've been bankruptcy restrictions  
9 otherwise applicable to prior predecessor parties. And I  
10 understand that if it's an issue of first impression, that that  
11 might not be enough, Your Honor, but that's how I think it  
12 should be decided.

13 THE COURT: Go ahead.

14 MR. PELLER: The -- two more points, Your Honor.  
15 One, I just want to be -- just to finish up, so in the  
16 November/December proceedings, we didn't appeal the no punitive  
17 damages for assumed liability -- you know, GM didn't assume  
18 liability for punitive damages, and we didn't appeal because we  
19 essentially won the imputation issues.

20 We did appeal the single issue that had not -- was  
21 not contained in the April and June proceedings, and that was  
22 the very particular question whether a claim that New GM was  
23 liable for failing to disclose certain defects and causing  
24 plaintiffs to miss the bar date, to be able to file a timely  
25 claim, in bankruptcy, whether that was an independent claim or



1 not. Judge Gerber held that it was not an independent claim.  
2 It really depended on Old GM's wrongdoing with respect to the  
3 bar date notice, and judge -- that's currently fully briefed in  
4 awaiting Judge Furman's decision.

5 But the -- that's the only thing we appealed because  
6 that was the only thing that was new except for the assumed  
7 liability punitive damages that was separate from what we were  
8 already appealing in the -- from the April and June rulings,  
9 appeals that we prevailed on.

10 Finally, Your Honor, you asked about opening the door  
11 to a whole bunch of discovery on behalf of non-ignition switch  
12 plaintiffs seeking to be able to pursue successor liability  
13 claims against Old GM by showing a due process --

14 THE COURT: I think you misspoke.

15 MR. PELLER: -- violation. I'm sorry.

16 THE COURT: I think you misspoke. You want to be  
17 able to pursue successor liability claims against New GM, not  
18 Old GM.

19 MR. PELLER: Yes, I'm sorry, against New GM. And,  
20 Your Honor, the -- some of these issues are being -- some of  
21 the non-ignition switch claim issues are being subject to  
22 discovery in front of Judge Furman, and Mr. Weisfelner has  
23 listed some of that discovery, but not all of the non-ignition  
24 switch claims.

25 So, for example, lead counsel, when they put the



1 consolidated complaint together, decided not to pursue all the  
2 claims that my clients are pursuing for non-ignition switch  
3 claims, so they did pursue a power steering defect, a side  
4 airbag defect, as we also allege, but we also allege a master  
5 door switch defect. That is not currently subject to discovery  
6 in the MDL case because the MDL discovery is only proceeding on  
7 the basis of the consolidated complaint and not my individual  
8 complaints that have not been consolidated. So if that  
9 discovery --

10 THE COURT: Are you participating in the discovery?

11 MR. PELLER: I am not actively participating. I'm  
12 participating to the extent of I have access to all the  
13 discovery. So the -- under the Second Circuit remand, Your  
14 Honor, respectfully, I don't believe that this Court really has  
15 a choice as to whether that door can be opened or not. The  
16 Second Circuit said with respect to non-ignition switch claims  
17 that the stay that had been imposed, which is the only thing  
18 that, as we've been through the June judgment had done is  
19 stayed those claims, was vacated. And so now these claims  
20 formally are not stayed. We should be able to just go  
21 litigate. We haven't gone and pressed that because we don't  
22 want to cause unnecessary trouble, but they're not stayed. The  
23 stay was vacated, and then proceedings --

24 THE COURT: Where in the opinion does it say that?

25 MR. PELLER: It's the end of the opinion.



1 THE COURT: Oh, I know it remands the non-ignition  
2 switch --

3 MR. PELLER: It says vacated. It says vacated, the  
4 rulings are vacated and then remanded, and --

5 THE COURT: I could impose the stay again.

6 MR. PELLER: Yes, absolutely, Your Honor, and our  
7 claims are already stayed in the MDL court. We're not going  
8 anywhere. But my point, Your Honor, is that the Second Circuit  
9 has said its remanded to this court to make the due process  
10 determinations for the non-ignition switch plaintiffs.

11 THE COURT: Well, I don't know whether that -- it  
12 clearly is remanded to this court. It didn't address -- it  
13 didn't decide -- other than with respect to your specific  
14 claim, it didn't decide the non-ignition switch plaintiff  
15 issues. It's clearly on my plate, and hence my questions to  
16 Mr. Weisfelner this morning about the statements of the August  
17 hearing, how that gets into -- not how that gets into but how  
18 the September scheduling order resulted and then the November  
19 decision and the December judgment. Any other points you want  
20 to raise?

21 MR. PELLER: Well, the reason we address that, Your  
22 Honor, is because we understood that although there's that  
23 issue with respect to the failure to appeal on behalf of other  
24 parties, New GM is separately arguing that we are precluded by  
25 the failure to appeal the November and December, and I just





1 wanted to make clear that -- our disagreement with that.

2 THE COURT: I have your point on that.

3 MR. PELLER: Thank you, Your Honor. That's all I  
4 have.

5 THE COURT: Okay.

6 MR. WEISFELNER: Your Honor, may I address real  
7 quickly two points?

8 THE COURT: Really quickly because we're going to  
9 break for lunch and come back.

10 MR. WEISFELNER: Very quickly. Your Honor, first on  
11 what's going on in front of Judge Furman, to the extent that my  
12 comments were interpreted to mean that Judge Furman has ordered  
13 or that the parties are conducting due process discovery,  
14 that's not what I meant to say. What I meant to say is what's  
15 going on in front of Judge Furman is whether or not certain  
16 defects were known defects by Old GM and when Old GM knew it.

17 What I conveyed was naturally that discovery goes on  
18 and is the discovery necessary for a court -- not Judge Furman,  
19 but a court -- to make a due process determination. How to get  
20 to a due process violation unless you know whether or not the  
21 defect at issue was known and/or concealed, and therefore the  
22 requisite notice, be it either direct or publication, was  
23 appropriate. So I agree with Mr. Peller to the extent that  
24 Your Honor construed my commentary to mean that there is due  
25 process discovery going on in front of Judge Furman.



1 THE COURT: Well, I had understood you -- and maybe I  
2 misunderstood you, but I had understood you to tell me that  
3 Judge Furman was going to decide the issue of whether  
4 non-ignition switch plaintiffs were denied due process because  
5 Old GM knew about and concealed defects.

6 MR. WEISFELNER: Your Honor, I do know that Judge  
7 Furman is overseeing --

8 THE COURT: I'm going to ask him.

9 MR. WEISFELNER: Yes, I know that.

10 THE COURT: I've said before, I don't call him  
11 regularly, but I do -- we from time to time -- we don't speak  
12 about the substance, but we speak about what issues are  
13 percolating and who's going to decide them.

14 MR. WEISFELNER: Certainly. I do know that among the  
15 discovery that Judge Furman is overseeing is discovery that  
16 goes to the issue of what did Old GM know and when did it know  
17 it about certain defects. I reached the conclusion in my own  
18 mind that the only reason why Judge Furman would be  
19 orchestrating that discovery is so that parties either before  
20 him or before you can make the argument about due process as it  
21 relates to successor liability since I firmly believe, and I  
22 think most of us with the exception of New GM believe, that  
23 issue's not relevant with regard to independent claims.

24 THE COURT: The other takeaway from what you told me  
25 earlier is that that discovery cuts off in September.



1 MR. WEISFELNER: Correct. The last thing I wanted to  
2 address, Your Honor, is the discrepancy between Mr. Steel's  
3 statement with regard to used car purchasers and Mr. Peller's  
4 statement and Your Honor's inquiry. Your Honor, I can imagine  
5 a hypothetical that would allow a used car purchaser economic  
6 loss rights, but in the nature of independent claims that are  
7 different than the claims of its seller, and here's the  
8 hypothetical.

9 Someone owned a car, a GM, an Old GM car with an  
10 ignition switch or non-ignition switch defect, up until some  
11 time in 2013. Having then sold that car to a new purchaser,  
12 that purchaser had that car with a known but undisclosed defect  
13 until such time as the recalls were done in 2014. It's easier  
14 to do it with an ignition switch first because we know that to  
15 be true. Under that hypothetical, I would assert that the used  
16 car purchaser has an independent claim against New GM sounding  
17 in the nature of economic loss that his predecessor seller did  
18 not have. So with that clarity, I have nothing else to add.

19 THE COURT: Okay. We're going to take -- is there  
20 anybody else on your side of the table?

21 MR. SCOTT: Your Honor, Brendan Scott. I have about  
22 five minutes at most.

23 THE COURT: No, we'll do it after lunch then.

24 MR. SCOTT: Okay.

25 THE COURT: We'll be back at 2:00.



1 MR. WEINTRAUB: Your Honor?

2 THE COURT: Mr. Weintraub?

3 MR. WEINTRAUB: You had asked for references to --  
4 and orders to the deferral of discovery and deferral of --

5 THE COURT: Tell me at 2:00.

6 (Recess taken at 12:38 p.m.)

7 (Proceedings resumed at 2:04 p.m.)

8 THE CLERK: All rise.

9 THE COURT: Please be seated. Back on the record in  
10 Motors Liquidation Company 09-50026.

11 Mr. Weintraub, briefly.

12 MR. WEINTRAUB: Very briefly, Your Honor. I thought  
13 I heard the Court asking for citations to orders concerning the  
14 deferral of certain issues in discovery, and I just so happen  
15 to have two such orders with me. One of them is actually the  
16 April 15, 2015, decision of Judge Gerber. I only have his  
17 version, not the Westlaw version with me, but I'm going to be  
18 reading from page 4 of the decision, which is page 8 of the  
19 docket. And it's Docket 13109. The Court here is talking  
20 about the non-ignition switch economic loss people, which are  
21 the motion to enforce that did not go forward. And the Court  
22 writes:

23 "The other category of plaintiffs later coming into  
24 the picture (the Non-Ignition Switch Plaintiffs)  
25 brought actions asserting economic loss claims as to



1 GM branded vehicles that did not have Ignition Switch  
2 Defects, including cars made by New GM and Old GM  
3 alike. In fact, most of their cars did not have  
4 defects and/or were not the subject of recalls at  
5 all. But they contend, in substance, that the  
6 Ignition Switch Defect caused damage to 'the brand'  
7 resulting in economic loss to them. New GM brought  
8 still another motion to enforce the sale order with  
9 respect to them, though this third motion has been  
10 deferred pending the determination of the issues  
11 here."

12 THE COURT: Okay.

13 MR. WEINTRAUB: So that's one citation. The other  
14 citation is the Court's scheduling order of September 15, 2014,  
15 which is Document Number 12898, and that relates to this same  
16 motion to enforce on non-ignition switch economic loss  
17 claims --

18 THE COURT: Can you just give me the date again? I'm  
19 sorry.

20 MR. WEINTRAUB: I'm sorry, the date?

21 THE COURT: Yes.

22 MR. WEINTRAUB: September 15, 2014.

23 THE COURT: Thank you.

24 MR. WEINTRAUB: And the Court writes at page 2:

25 "Ordered that no discovery shall take place with



1           respect to the monetary relief motion to enforce,"  
2           which is that motion, this motion, "until further  
3           notice of this court."

4           THE COURT: Thank you.

5           MR. WEINTRAUB: Thank you, Your Honor.

6           THE COURT: Is there anybody else on the plaintiffs'  
7 side who wants to be heard?

8           MR. HIRSCH: Yes, Your Honor.

9           You go first? Okay.

10          MR. SCOTT: Good afternoon, Your Honor. Brendan  
11 Scott, Klestadt Winters Jureller Southard & Stevens, on behalf  
12 of the Pilgrim Plaintiffs. I'll be very brief.

13           You know, we've covered a lot of ground thus far.  
14 Some of it is applicable to my client group, some of it is not,  
15 and that's the reason I stand to speak. Our representative  
16 group who is, in lower case, non-ignition switch plaintiff  
17 group, they're not part of the MDL action, and they had no  
18 representation in the bankruptcy case until January of 2016.  
19 GM's arguments with respect to our -- my clients are  
20 essentially the same, that you don't receive the benefit of the  
21 Second Circuit decision because you weren't part of the appeal,  
22 but you're bound by the November decision and the December  
23 judgment even though we didn't have a legitimate opportunity to  
24 participate in those proceedings.

25           So in order to understand that, I'll just very



1 briefly go through the timeline. Our client group filed their  
2 complaint on October 14th, 2015, the very same day that the  
3 issues that led to the November decision were being argued.  
4 Two weeks later, on October 28th --

5 THE COURT: What court?

6 MR. SCOTT: Pardon?

7 THE COURT: What court?

8 MR. SCOTT: Here in -- before Judge Gerber. On  
9 October 28th, we received a letter from GM, a demand letter,  
10 demanding that we withdraw the complaint because it's stayed.  
11 They also assert at that time the scheduling order, but of  
12 course all briefing and oral argument had been completed at  
13 that time. They, you know, have taken the position that  
14 regardless of that, because you didn't appeal from the December  
15 judgment, you're bound by it and they interpret it to say that  
16 you're not able, at this point, to establish a due process  
17 violation because you failed to do so. And in their papers,  
18 they argue that we failed to do so in 2015.

19 Of course, we weren't part of this until October of  
20 2015, and we didn't have an opportunity to engage in any  
21 discovery related to due process violations. We didn't first  
22 appear in the bankruptcy court until February of 2016. The --  
23 GM filed a motion to enforce the sale order in January of 2016.  
24 We filed a response wherein we raised the issue of due process  
25 and the need for discovery.



1           The motion to enforce was stayed by way of  
2 stipulation wherein we reserved the right, and it states that  
3 the -- our entry into the stipulation is without prejudice to  
4 our right to take discovery. GM did insist upon the addition  
5 of language that it also does not prejudice their position to  
6 argue that we're not entitled to discovery.

7           But we did not -- we did not sit on our rights when  
8 we were made aware of these proceedings. In our first  
9 appearance in this case, we made it known that we thought that  
10 the due process issue needed to be resolved. We were -- the  
11 matter was stayed, and then we were rolled up into this  
12 process. So we haven't had an opportunity to take discovery on  
13 the due process issue.

14           We think it's manifestly unjust if we're going to be  
15 held to -- if we're going to be bound by the November decision  
16 and the -- and the December judgment, we don't think that  
17 prohibits us, or anyone, from establishing a due process  
18 violation. But to the extent the Court believe it does, we  
19 think that we ought to be carved out from that because we had  
20 no legitimate opportunity to participate in those proceedings.

21           THE COURT: Just give me a few skeletal facts about  
22 the Pilgrim Plaintiffs, please.

23           MR. SCOTT: The Pilgrim Plaintiffs are a group of  
24 Corvette owners. They have -- the defect here is with the  
25 engine. It -- the defect causes an -- a hole to be blown,





1 potentially to be blown, into the engine. Could be while the  
2 car is driving down the road, could be when you -- when you  
3 turn -- you know, turn on the ignition.

4 I think there was at least one personal injury case  
5 where there was an accident. The rest of them are essentially  
6 economic loss. It's about \$15,000 to replace the engine. And  
7 we believe that Old GM knew about this before the sale order,  
8 and we wanted to engage in discovery.

9 THE COURT: What year are these vehicles?

10 MR. SCOTT: They're -- there's a whole range of  
11 vehicles. They are pre-sale.

12 THE COURT: Yeah. But give me the years.

13 MR. SCOTT: I don't know if I have that, Your Honor.  
14 I apologize. I want to say they start with 2006, but I really  
15 -- I really don't have that information.

16 THE COURT: Are any of the alleged defects covered by  
17 recalls?

18 MR. SCOTT: This defect, there was -- there was no  
19 recall. There were other recalls on these vehicles. So that  
20 Old GM --

21 THE COURT: Well, I've had -- you know, I've had cars  
22 that have had recalls for sure.

23 MR. SCOTT: No. The point is that Old GM --

24 THE COURT: My question -- just so we have a clear  
25 record. Your -- the alleged defect that you described to me is



1 with respect to the engine and a particular aspect of the  
2 engine. And my question is have there been any recalls  
3 relating to the defect that you allege?

4 MR. SCOTT: There have not been, Your Honor. But I  
5 did point out that there had been other recalls --

6 THE COURT: I don't care whether there have been  
7 other recalls.

8 MR. SCOTT: Only for the sake -- only for the sake  
9 that --

10 THE COURT: Stop. I asked a specific question.  
11 You've answered my question.

12 MR. SCOTT: Yes.

13 THE COURT: Anything else you want to say?

14 MR. SCOTT: Yes. I just want to say, Your Honor,  
15 that the -- that the -- GM did know who the owners of these  
16 vehicles were because they had made other recalls on these  
17 vehicles. That was the point I wanted to make.

18 THE COURT: All right.

19 MR. SCOTT: So they were aware of addresses and the  
20 owners of these vehicles.

21 THE COURT: Thank you.

22 MR. SCOTT: Thank you, Your Honor.

23 THE COURT: Thank you.

24 Come on up.

25 MR. HIRSCH: Thank you, Your Honor. Attorney Joram



1 Hirsch; I represent the Pitterman Plaintiffs.

2 THE COURT: Yes. What I thought, Mr. Hirsch --

3 MR. HIRSCH: Your Honor, I'm having a little trouble  
4 hearing you. I apologize.

5 THE COURT: What I wanted to do was finish on this  
6 and then deal with the Pitterman Plaintiffs as a separate  
7 matter.

8 Unless, I don't know, Mr. Steinberg, do you want to  
9 deal with it all as part of one?

10 MR. HIRSCH: However you want to do it, Your Honor.

11 THE COURT: Just stay up there for a second.

12 Mr. Steinberg, what's your pleasure?

13 MR. SCOTT: I'm prepared to respond after all the  
14 plaintiffs have talked, so I'm prepared to just let Mr. Hirsch  
15 say what he wants to say.

16 THE COURT: All right. Go ahead, Mr. Hirsch.

17 MR. HIRSCH: Thank you, Your Honor. So I represent  
18 the Pitterman Plaintiffs. This is a post-closing accident  
19 case. It involves a 2004 Suburban manufactured by Old GM. The  
20 incident occurred on July 13, 2011. That's two years after the  
21 sale date. The case does not involve the same ignition switch  
22 defect that's the subject of this proceeding. The defect is a  
23 defect in the design of what's called a brake transmission  
24 shift interlock. That's an interlock between the brake, the  
25 transmission, and the ignition key such that you can't shift



1 out of park unless the key is in certain positions.

2 We commenced a product liability action under  
3 Connecticut product liability law. That's pending in the  
4 United States District Court for the District of Connecticut,  
5 and scheduled for trial July 5, 2017. We have not -- we've  
6 pled only a product liability action. We have not pled a fraud  
7 or any other misrepresentations or any claim under the Federal  
8 Motor Vehicle Safety Standards recall provisions. It's a  
9 strict product liability action. So --

10 THE COURT: At least as -- at least as to  
11 compensatory damages, this is assumed liability?

12 MR. HIRSCH: I -- my belief is yes.

13 THE COURT: Okay.

14 MR. HIRSCH: But that's the subject of the debate  
15 that's been ongoing for months now. My position has always  
16 been we're alleging a products liability action. You've  
17 assumed this liability. As I get through it, you'll  
18 understand, I think, where the argument is.

19 THE COURT: Okay. Go ahead.

20 MR. HIRSCH: But we initially claimed punitive  
21 damages. We got a letter from counsel saying you can't do it,  
22 and that letter came -- that was the first contact we had with  
23 this bankruptcy proceeding. And that letter came in August 26,  
24 2015, and we amended our complaint to withdraw the punitive  
25 damage claim. Okay?



1 THE COURT: Okay. It's still out. You haven't tried  
2 to put it back?

3 MR. HIRSCH: Nope. Nope. It's still out. We're not  
4 going to put it back in, and we're not trying to put it back  
5 in. It's -- we're not going that way.

6 THE COURT: Okay.

7 MR. HIRSCH: So our -- the issues that pertain to my  
8 case fall into two categories, and there are four claims. And  
9 I have a graphic that I'd like to give to the Court, if you  
10 don't mind, because I like to think in terms of graphics. It  
11 helps me.

12 THE COURT: Thank you.

13 MR. HIRSCH: Thank you. So the issue -- the issues  
14 that pertain to my case fall into four categories -- two  
15 claims, failure to warn, failure to recall and retrofit. And  
16 two categories, one based on Old GM's pre-sale conduct, that's  
17 prior to June 2009. My car, remember, was built in 2004. And  
18 the second claim is against New GM based on New GM's post-sale  
19 conduct where there was conduct between June 2009 and July  
20 2011, the date of my accident. That's what at issue here.  
21 So --

22 THE COURT: With respect to your -- and you allege  
23 that the New GM post-sale conduct are independent claims?

24 MR. HIRSCH: They are -- they are -- they are  
25 independent in the -- in the sense that they are based solely



1 on New GM's post-sale conduct. Pre-sale conduct, failure to --  
2 for example, pre-sale conduct failure to warn -- failure to  
3 warn, New GM has agreed they've assumed that.

4 THE COURT: Okay.

5 MR. HIRSCH: I --

6 THE COURT: Is that correct, Mr. Steinberg?

7 MR. STEINBERG: It is correct.

8 THE COURT: Okay.

9 MR. HIRSCH: So category 1 in the top left-hand  
10 corner, that's not a problem. They've assumed that.

11 THE COURT: Okay.

12 MR. HIRSCH: We've alleged, in addition, New GM's  
13 post-sale conduct based on New GM's conduct. Now maybe we  
14 didn't say independent claim based solely on New GM's conduct,  
15 but that's our claim, and I can state it for the record, if  
16 you'd like. Our claim is based on New GM's post-sale conduct  
17 in terms of the claim against them for both failure to warn and  
18 failure to recall.

19 THE COURT: Which district judge is it pending  
20 before?

21 MR. HIRSCH: Judge Hall, Janet Hall. So recently --

22 THE COURT: And you told Judge Hall that --

23 MR. HIRSCH: We'll be here today. I told Judge Hall  
24 I'm here today.

25 THE COURT: Okay.



1 MR. HIRSCH: We had a pretrial conference last  
2 Monday.

3 THE COURT: Okay.

4 MR. HIRSCH: So she's looking for guidance from the  
5 Court.

6 THE COURT: But did you tell her that your -- that  
7 this failure to warn claim against New GM is based solely on  
8 New GM's conduct?

9 MR. HIRSCH: Yes.

10 THE COURT: Okay. Go ahead.

11 MR. HIRSCH: Yes. Because we have two years' worth  
12 of conduct from between June --

13 THE COURT: The sale and the accident.

14 MR. HIRSCH: Between June 2009, the sale, and June --  
15 and July 2011, there's two years when GM was aware of this  
16 problem. New GM was aware of the -- what we claim is a defect.  
17 They're obviously challenging it. But we contend they're aware  
18 of it and they didn't warn. They didn't recall or retrofit.

19 THE COURT: Go ahead.

20 MR. HIRSCH: So in a recent letter to the Court from  
21 Attorney Steinberg, I think they've clarified a lot of issues  
22 respect to the claims based on New GM's conduct. At -- it's  
23 document 13929, page 204, second full paragraph. It was just  
24 recently sent. It was in connection with the Tronox matter,  
25 but I'm not going to deal with Tronox. But in that letter, New



1 GM said quote:

2 "Various plaintiffs in this proceeding present  
3 threshold issue number 2 as a theoretical question  
4 whether plaintiffs and vehicles without Ignition  
5 Switch Defect" -- and I don't have an Ignition Switch  
6 Defect -- "can assert independent claims against New  
7 GM in light of the Second Circuit opinion. The  
8 answer is and always has been 'yes' if the claim is  
9 truly independent. A valid Independent Claim must be  
10 based solely on New GM duty incurred after the 363  
11 Sale and predicated solely on New GM's conduct."

12 THE COURT: And you believe you satisfy everything  
13 that you just read?

14 MR. HIRSCH: Yes. I -- and I -- and if they believe  
15 that I didn't say it in the pleadings, I'd be happy to amend my  
16 complaint, if Judge Hall lets me, to say that.

17 THE COURT: Okay. Go ahead.

18 MR. HIRSCH: Now, whether New GM had a duty to warn  
19 or recall is not an issue for your court -- for you to decide,  
20 Your Honor.

21 THE COURT: I agree.

22 MR. HIRSCH: With all due respect.

23 THE COURT: I agree with that.

24 MR. HIRSCH: Okay.

25 THE COURT: You don't have to do that with respect or





1 our otherwise. I agree.

2 MR. HIRSCH: Okay. So that issue, it's always been  
3 our position, is Judge Hall's obligation to decide whether that  
4 duty exists. But if that duty exists, we are -- we are, in my  
5 view, permitted to present that issue to Judge Hall for her to  
6 decide and then charge the jury appropriately.

7 And I'd like some -- I'd like to ask Attorney  
8 Steinberg through the Court if he agrees that we could --

9 THE COURT: I'll ask Mr. Steinberg.

10 MR. HIRSCH: Well, then you ask Mr. Steinberg if he  
11 agrees that we could present the claim against New GM based  
12 solely on New GM's post-sale conduct with respect to failure to  
13 warn and failure to recall and retrofit.

14 THE COURT: All right. Continue with your argument.

15 MR. HIRSCH: Okay. So -- and if he doesn't agree, I  
16 can go -- I have a big five-page analysis as to why I'm  
17 permitted to do so under the November decision, if you'd like  
18 to me to go through that. But I think it's mooted out by what  
19 Mr. Steinberg just told the Court. That leaves for the -- that  
20 leaves the only issue to be determined is whether or not we can  
21 proceed on a claim of failure to recall retrofit based on Old  
22 GM's conduct pre-sale. In other words, Old GM's failure to  
23 recall or retrofit the vehicle.

24 The vehicle was built, as I told the Court, in 2004.  
25 The collision occurred that's the subject of my case in 2011.



1 GM -- Old GM was aware of this problem. In fact, in 2007,  
2 modified the vehicles, the Suburbans, for the model year 2007  
3 to correct what the defect we claim existed. But they didn't  
4 recall the -- they didn't recall the car.

5 Now, we're not claiming that they had an obligation  
6 under Federal Motor Vehicle Safety Standards without asserting  
7 a private right of action under that section. We're simply  
8 saying you have a common law duty to recall when you're aware  
9 that there's a problem with the car. It's a voluntary recall  
10 obligation. The --

11 THE COURT: And can I give recognize to such a claim?

12 MR. HIRSCH: Yes. And I included -- I included in my  
13 most recent letter to the Court two cases. I cited the Court  
14 to two cases, and my letter to the Court was just -- it's  
15 docket number -- if I could find it here -- 13937. And the two  
16 cases I cited to the Court are Arguetta v. Overhead Door Corp.,  
17 and that was attached to my letter. And I cited another  
18 District Court case, Savage v. Scripto-Tokai Corp. Both are in  
19 my letter. Our position is Connecticut recognizes as part of a  
20 product liability claim negligent failure to recall or  
21 retrofit.

22 THE COURT: And I take it, then, it's your position  
23 that Old GM's failure to recall and retrofit is an assumed  
24 product liability claim?

25 MR. HIRSCH: Exactly correct. Because it's part of



1 the product liability claim as recognized in -- under  
2 Connecticut law. Now there's -- the decision by Judge Gerber  
3 sort of confused the issue because I -- admittedly, there's a  
4 paragraph in the judgment that seems to suggest that a duty to  
5 recall or retrofit is not permitted based on Old GM's conduct,  
6 and that was paragraph 29 of the judgment.

7 Now, I submit to the Court that that issue as to  
8 whether or not a product liability claim that GM has assumed  
9 includes a recall was not properly before the Court at the time  
10 of the November decision and December judgment for a couple of  
11 reasons.

12 One, we weren't given a notice that that issue was  
13 going to be presented to the Court. It wasn't -- it -- there  
14 was a letter -- I have to go back through a little chronology,  
15 Your Honor, unfortunately, Your Honor, to explain how this all  
16 evolved. So there was a letter that came to use in September  
17 of 2015, and it's with -- it's Docket 13466. This is a letter  
18 to Judge Gerber, and it talks about the marked complaints,  
19 which you've heard a lot about. And we've -- we got that  
20 letter because our case fell within the other complaints  
21 categories.

22 And the other complaints categories that's referenced  
23 in that letter -- and by the way, the first letter we got back  
24 in August of -- August 26, 2015, only complained about the fact  
25 that we've alleged punitive damages. Didn't say anything about



1 any other claim, just punitive damages. Then we got the  
2 scheduling order, and the scheduling order directed King &  
3 Spalding, you know, counsel, to submit a procedure for dealing  
4 with things, and one of the procedures was to mark up other  
5 plaintiffs' complaints, as Your Honor have seen. So I fell  
6 into the category of other plaintiffs' complaints.

7           So next I get a letter dated September 23 addressed  
8 to Judge Gerber, and in that they talk about -- they discuss  
9 six -- five, six categories, failure to recall, negligent  
10 failure to identify, negligent infliction, civil conspiracy,  
11 Section 402(b), and pre-sale accidents. The only paragraph  
12 that applies to me, because I've made none of those claims  
13 other than product liability claim, is the failure to recall  
14 and retrofit.

15           And if you look at that letter, that letter says  
16 nothing about a claim based on Old GM's failure to recall or  
17 retrofit. It talks about New GM's failure to recall or  
18 retrofit. So there's nothing in that letter that alerted me or  
19 the Court, I would say, that the Court would be dealing with  
20 the issue of whether or not Old GM's duty to recall or retrofit  
21 was -- comes within the umbrella of a products liability claim  
22 as defined by state law. Just wasn't there.

23           So now I get the -- and that -- and that letter  
24 references a case Moore v. Ross as an example of the types of  
25 claims that were prohibited. That Moore v. Ross claim -- I'm



1 sure Your Honor has seen that, I have a copy here for the  
2 Court, doesn't talk about Old GM's conduct. It only talks  
3 about New GM's conduct. Doesn't -- it doesn't put up -- it  
4 doesn't tee up the issue whether or not Old GM's failure to  
5 recall or retrofit comes within the state law product liability  
6 claim that's been assumed. So it's our position that we  
7 weren't given notice that this part of our claim was at issue  
8 in the case. That -- in other words, being challenged by Old  
9 GM.

10 So the next thing that happens is we get the -- Judge  
11 Gerber issues his November decision and December judgment. We  
12 didn't have an appearance in the file. So we didn't get a copy  
13 of it because we weren't in -- we weren't in the ECF system.  
14 And we got a copy of it in May of 2016 when it was sent to us  
15 by King & Spalding based on my review of my file.

16 And now for the first time, this -- all the claims  
17 about you can't bring independent claims, blah, blah, blah,  
18 they talk about in that case failure due to the obligation if  
19 you don't like our -- that if we've alleged Old GM a successor  
20 to New GM or vice versa.

21 THE COURT: Reversed.

22 MR. HIRSCH: Vice-versa, New GM a successor to Old  
23 GM, I agreed to take out the word "successor."

24 THE COURT: You're not asserting --

25 MR. HIRSCH: No.



1 THE COURT: -- a claim against New GM based on  
2 successor liability?

3 MR. HIRSCH: No.

4 THE COURT: Okay.

5 MR. HIRSCH: No. As a straight product liability  
6 claim.

7 THE COURT: Okay.

8 MR. HIRSCH: Because we're not seeking punitive  
9 damages. We're not seeking any -- you know, no other -- no  
10 other claims. They say that our claims based on alleged due to  
11 the warn was inappropriate and alleged failure to recall and  
12 retrofit are inappropriate. And they don't distinguish between  
13 claims based on Old GM's conduct and New GM's conduct.

14 THE COURT: Just I know you'll probably get there,  
15 but let me ask you now. Are you asserting a claim against New  
16 GM for failure to recall or retrofit?

17 MR. HIRSCH: Yes.

18 THE COURT: Okay.

19 MR. HIRSCH: Based solely on New GM's conduct  
20 post-June 2009.

21 THE COURT: And is there Connecticut case law that  
22 you believe would support the assertion of a claim for failure  
23 to recall retrofit against New GM?

24 MR. HIRSCH: Well, that's a difficult subject because  
25 this type of situation has never come up before in Connecticut



1 in terms of a bankrupt, somebody's buying out of -- buying the  
2 assets out of bankruptcy and whether or not a claim can be  
3 asserted.

4 THE COURT: Your position, though, that would be  
5 purely a question of Connecticut state law?

6 MR. HIRSCH: Absolutely.

7 THE COURT: That Judge Hall would have to address.

8 MR. HIRSCH: Correct.

9 THE COURT: Whether state law -- Connecticut state law  
10 would recognize a cause of action against New GM based on  
11 solely on its own conduct.

12 MR. HIRSCH: After June 2009. Yes.

13 THE COURT: For -- right for failure to recall  
14 retrofit.

15 MR. HIRSCH: Yes. And in Connecticut, duty is  
16 defined as a combination of public policy and foreseeability.  
17 Is it foreseeable if GM has notice -- New GM has notice of an  
18 issue with their cars, which we have evidence that they did,  
19 notice that there were incidents. We have other evidence of  
20 other similar incidents that New GM had knowledge.

21 THE COURT: So you took discovery on this issue of  
22 New GM's knowledge about the alleged defect in the Corvette?

23 MR. HIRSCH: It's a Suburban.

24 THE COURT: I'm sorry.

25 MR. HIRSCH: That's Okay.



1 THE COURT: You took discovery about New GM's  
2 knowledge --

3 MR. HIRSCH: Yes.

4 THE COURT: -- about this alleged defect in the  
5 Suburban.

6 MR. HIRSCH: New GM knew about it. There -- the  
7 witnesses that -- the witnesses I deposed were employees then  
8 and now. They were aware -- and I will tell Your Honor that  
9 this defect was remedied -- well, remedied -- there was a  
10 change in the design in the 2000 model year. There was  
11 congressional action that required them to make the change. GM  
12 made -- had an agreement with Matsu to make the change. It's  
13 -- they -- it's all over their records that they knew about the  
14 problem.

15 THE COURT: There was no recall but they changed the  
16 design.

17 MR. HIRSCH: Correct. Without a recall. And so  
18 their employees who we deposed, were employees then and now,  
19 were aware of what we claim was a defective condition. So it's  
20 -- your statement is exactly correct. It's our position that  
21 it's up to Judge Hall to decide whether Connecticut law  
22 recognizes a duty on New GM's part to warn and recall with  
23 respect to owners of the Suburban.

24 THE COURT: Let me you what facts do you intend to  
25 rely upon to establish this failure to recall restorative claim





1 against New GM based on -- solely on New GM's conduct?

2 MR. HIRSCH: Well, the facts, Your Honor, are very --  
3 are straightforward. New GM was continuing to get notices of  
4 other similar incidents involving this defect. And New GM's  
5 employees, who are then -- who are Old GM's employees as well  
6 as New GM's were aware that there were vehicles out there --

7 THE COURT: I don't want to know what -- at this  
8 point, what Old GM knew. I want to know --

9 MR. HIRSCH: New GM.

10 THE COURT: -- what it is you're arguing that New GM  
11 knew.

12 MR. HIRSCH: New GM --

13 THE COURT: And you're not doing this solely based on  
14 imputation --

15 MR. HIRSCH: No.

16 THE COURT: -- with the people who work for Old GM  
17 now are the New GM. They knew or must have known about it.  
18 You're saying you've established -- you believe you can  
19 establish actual knowledge by employees of New GM about the  
20 existence of this defect in pre-2007 Suburban.

21 MR. HIRSCH: Well, I can say that the -- that the  
22 employees who are employed by New GM were also employed by Old  
23 GM, so they were New GM employees that were aware of this.

24 THE COURT: Did you find -- do you have any documents  
25 that were produced in discovery that show that New GM was aware



1 of this alleged defect in pre-2007 Suburban before your clients  
2 had their accident?

3 MR. HIRSCH: They were being sued for these kinds of  
4 cases, and there were reports of other similar incidents after  
5 2009 there were being reported to General -- to New GM about  
6 defects in these pre-2007 cars.

7 THE COURT: Do you believe that your -- that in light  
8 of Judge Gerber's prior rulings that you're able to offer  
9 evidence about what Old GM knew before the sale? I'm trying --  
10 what I'm trying to understand, Mr. Hirsch, is are you going to  
11 be pure, clean as the driven snow, your whole case is going to  
12 be based on what New GM knew --

13 MR. HIRSCH: No.

14 THE COURT: -- about this alleged defect in the  
15 pre-2007 Suburban?

16 MR. HIRSCH: No. I can't say that.

17 THE COURT: Okay.

18 MR. HIRSCH: Because one of the claims I'm making is  
19 Old GM's failure to warn, which is conceded is assumed product  
20 liability claim.

21 THE COURT: Let me ask you if Judge Hall does not  
22 permit you to -- if she were to conclude that there is no  
23 assumed liability for failure to recall and retrofit, do you  
24 believe you would still be entitled to introduce evidence about  
25 Old GM's knowledge about the defect?



1 MR. HIRSCH: Yes. Under the failure to warn claim.

2 THE COURT: Okay. Go ahead. And there's no dispute  
3 that the failure to warn claim -- well, let me ask, is there a  
4 dispute between New GM and you as to whether the failure to  
5 warn claim is an assumed liability?

6 MR. HIRSCH: That's where we started this  
7 conversation. I think Attorney Steinberg said no. That's --  
8 he agrees that's an assumed claim.

9 THE COURT: We'll argue from Mr. Steinberg --

10 MR. HIRSCH: But that's what I thought we started --  
11 that's how I started --

12 THE COURT: Oh, Okay.

13 MR. HIRSCH: -- the discussion.

14 THE COURT: That's fine.

15 MR. HIRSCH: The answer is, as far as I understand  
16 it, there's no dispute that a failure to warn based on Old GM's  
17 conduct --

18 THE COURT: So you believe you get this evidence in  
19 on the failure to warn.

20 MR. HIRSCH: At a minimum.

21 THE COURT: Okay.

22 MR. HIRSCH: Correct.

23 THE COURT: All right.

24 MR. HIRSCH: So -- and I can go back to the failure  
25 to retrofit because it's my position that Old GM's failure to



1 recall between 2004 and 2009 -- my car was built in 2004, is  
2 also an assumed claim because it's part of a product liability  
3 claim as -- we believe, as recognized in the state of  
4 Connecticut. So if you saw -- I think I established in the  
5 letter regarding the marked-up complaints, that didn't address  
6 Old GM's failure to recall. That addressed New GM's failure to  
7 recall.

8           So that marked-up -- that the judgment of -- the  
9 November decision and the December judgment that was supposed  
10 to be based on the marked-up complaints should not have  
11 addressed Old -- any claim for a failure to recall based on Old  
12 GM's conduct because that wasn't part of what was presented as  
13 an issue that was going to be decided.

14           Nonetheless, for whatever reason, Judge Gerber made  
15 that statement and so I -- you have to interpret what that  
16 statement means. And it's our position -- and I think I said  
17 it, it's -- there doesn't appear to be any discussion in Judge  
18 Gerber's decision regarding the basis for the statement that  
19 New GM would not be responsible for Old GM's failure to recall.  
20 There's no discussion whether it's a recognized under --  
21 whether it is or isn't recognized under product liability law.  
22 I don't think Judge Gerber intended, and I don't think you  
23 intend to survey the law of 50 states and see what --

24           THE COURT: That I can assure you on.

25           MR. HIRSCH: I didn't think you would, and I didn't



1 think he was doing that, either. So I have to -- and I would  
2 also point out that there's nothing -- there's no explanation  
3 why a product liability claim under state -- any particular  
4 state law can't include a failure to recall. There's nothing  
5 in the definition of assumed liabilities that would exclude an  
6 allegation of failure to recall or retrofit within the confines  
7 of product liability claim recognized under state law.

8 I think you can interpret that statement in his  
9 opinion and decision to apply to recall obligations under the  
10 Federal Motor Vehicle Safety Standards and therefore  
11 distinguish it from our case. Because we're not making a claim  
12 under the Federal Motor Vehicle Safety Standards. Or you can  
13 interpret it as dicta as not been having been properly before  
14 the Court.

15 It's their -- it's our position that since GM has  
16 assumed liability for product liability claims based on  
17 vehicles manufactured by Old GM and because under Connecticut  
18 law -- and it's up to -- if they disagree, it's up to Judge  
19 Hall to decide -- the product liability claim includes a claim  
20 for failure to recall or retrofit, then New GM has assumed  
21 liability for the product liability claim we've asserted. In  
22 footnote 30 of the November decision, Judge Gerber stated:

23 "New GM assumed responsibility for product liability  
24 claims, which would make it liable for compensatory  
25 damages based on anything that even Old GM had done."



1 And that's what we're asserting. And there's nothing  
2 in the November decision or the December judgment that would  
3 indicate New GM is entitled to carve out of a product liability  
4 claim recognized under state law, a particular aspect of it.

5 THE COURT: I understand your argument.

6 MR. HIRSCH: Okay. So what I'm looking for, Your  
7 Honor, is hopefully, a ruling that would allow us to proceed in  
8 the United States District Court subject to Judge Hall making  
9 whatever decision she needs to make regarding what's permitted  
10 under Connecticut state law with a claim based -- a claim  
11 against Old GM -- or, I'm sorry, a claim based on Old GM's  
12 failure to warn, failure to recall, and based solely on New  
13 GM's post-sale conduct with respect to both warning and recall.

14 THE COURT: Are there motions pending before Judge  
15 Hall whether Connecticut law permits the failure to recall/  
16 retrofit claim?

17 MR. HIRSCH: No. The -- GM has not made that motion  
18 in state court. They made a bunch of other motions relying on  
19 the bankruptcy court order, including the fact that we can't  
20 proceed with a claim based on New GM's failure to recall or  
21 failure to warn. But that's been precluded even solely based  
22 on GM's -- New GM's conduct.

23 THE COURT: Do you have a date for final pre-trial  
24 conference?

25 MR. HIRSCH: We had it. We had the pretrial



1 conference on Monday. The judge indicated she will probably  
2 schedule another one because she did not reach all of the  
3 pretrial motions, and it's unclear whether there's -- she's  
4 going to rule on them with or without our further argument or  
5 hearing. So the answer is I don't know. It's not scheduled.  
6 There might be.

7 THE COURT: Fine. Thank you, Mr. Hirsch.

8 MR. HIRSCH: Thank you, Your Honor.

9 THE COURT: Anybody else on the plaintiffs' side who  
10 wants to be heard?

11 MR. BABCOCK: Russell Babcock here on behalf of  
12 Benjamin Pillars. Now, before I get going here, my -- the  
13 primary focus of my oral discussion today is going to be on  
14 issue 1, which hasn't really been addressed up to this in time.  
15 And I think they kind of bypassed issue 1 and talked about  
16 issues 2 through 4.

17 THE COURT: Well --

18 MR. BABCOCK: I mean I could go either go at this  
19 point. I --

20 THE COURT: Yes. Go.

21 MR. BABCOCK: Okay.

22 THE COURT: Go.

23 MR. BABCOCK: All right. So basically what we have  
24 here is back in 2015, Judge Gerber issued a ruling which  
25 basically, from our perspective, gave us a green light to



1 proceed forward with our ignition switch case against New GM.  
2 They've -- they appealed that to Judge Furman. Judge -- and  
3 the issues were briefed, I believe, at the preliminary stage,  
4 at least. And during the process of being up on appeal, the  
5 Second Circuit came down with this ruling.

6 Judge Furman had a conference call with the attorneys  
7 suggest -- well, not suggest, he told us that he wanted us to  
8 come back down to this court to find out what impact the Second  
9 Circuit had on our claims above and beyond what was presently  
10 before him. He didn't want to make a ruling on that until he  
11 knew where things stood.

12 THE COURT: Tell me what your client's claims.

13 MR. BABCOCK: Yeah. We are -- we have brought an  
14 ignition switch claim against New General Motors. On argument  
15 on appeal up for Your Honor is that New GM consistently took  
16 the position that were an ignition switch plaintiff and that --  
17 and we cited in our supplemental brief, which we provided to  
18 the Court, excerpts from their response to our no stay -- no  
19 stay pleading where they repeat on more than one occasion that  
20 our claims are identical to the ignition switch pre-closing  
21 accident plaintiffs' claims. Now their argument now is that  
22 no, we're not --

23 THE COURT: Just tell me what it is that happened to  
24 your clients that you're suing on.

25 MR. BABCOCK: I see. Back in 2005, my -- the





1 decedent was driving the vehicle. The vehicle suddenly lost  
2 control. She was rendered incapacitated for the rest of her  
3 life. She passed away in 2012. During the police  
4 investigation, they noted that the ignition switch was -- had  
5 turned onto the "off" position, and the airbags had not  
6 deployed. The onboard computer indicated that no collision had  
7 -- it didn't register the collision having occurred. All  
8 indicators that this was obviously an ignition defect issue.

9 THE COURT: What was -- what was the model year of  
10 the car?

11 MR. BABCOCK: It was, I believe, a 2004 -- one moment  
12 here -- Pontiac Grand Am.

13 THE COURT: Okay. And is the subject vehicle under  
14 the recalls?

15 MR. BABCOCK: Yes. We -- notification was sent  
16 out --

17 THE COURT: Mr. Steinberg is saying no, shaking his  
18 head no.

19 MR. BABCOCK: It was -- well, it was identified as  
20 the defective ignition June of 2014.

21 THE COURT: In the later, so --

22 MR. BABCOCK: Yeah.

23 THE COURT: -- it was all within the definitions --

24 MR. BABCOCK: Yeah.

25 THE COURT: Let me finish. You know, calm down.



1 MR. BABCOCK: That's Okay. No. It's been a long two  
2 days, Your Honor.

3 THE COURT: For me too.

4 MR. BABCOCK: I know. I know, Your Honor.

5 THE COURT: Okay. Your client's, the decedent's car,  
6 the 2004 Pontiac, would not be a subject vehicle. Is that  
7 correct?

8 MR. BABCOCK: Based upon the arguments that are now  
9 being made and based upon Your Honor's comments at your  
10 conclusions, that would appear to be the case.

11 THE COURT: You know, there was a lot of -- there's a  
12 lack of clarity about what non-ignition switch defects and  
13 plaintiffs are.

14 MR. BABCOCK: Yeah.

15 THE COURT: But I didn't think there was any dispute  
16 about what a initial caps "Ignition Switch Plaintiff" is,  
17 ignition switch defect. It's the first three recalls in  
18 February and March 2014 were subject vehicle, and client's --  
19 your -- the decedent's car was not one of those.

20 MR. BABCOCK: The reason why there's --

21 THE COURT: Is that correct?

22 MR. BABCOCK: No. No. Not correct, Your Honor.  
23 Because here's the problem, all the way through this litigation  
24 up until the Second Circuit decision, New GM took the position  
25 that we were an ignition switch pre-closing --



1 THE COURT: Here today, we've got a Second Circuit  
2 decision. Do you agree that the decedent's vehicle is not one  
3 of those subject vehicles that were subject to the February and  
4 March 2014 recalls?

5 MR. BABCOCK: It wasn't the beginning of the recalls.  
6 No. It was June 2014 recall.

7 THE COURT: Give me a clear -- I think that was a  
8 clear question.

9 MR. BABCOCK: I'm sure. What was the question?

10 THE COURT: Listen carefully, and I want a clear  
11 answer.

12 MR. BABCOCK: Sure.

13 THE COURT: Do you agree that the decedent's vehicle  
14 was a subject vehicle as defined in this -- in this case that  
15 was subject -- that was covered by the February and March 2014  
16 recalls?

17 MR. BABCOCK: I would agree it doesn't fit the  
18 definition --

19 THE COURT: Okay.

20 MR. BABCOCK: -- that has been presented.

21 THE COURT: That's what I wanted -- Okay. You  
22 believe that it was subject -- the vehicle was subject to one  
23 of the later, two months later, recalls.

24 MR. BABCOCK: It was the June or July 2014 recall.

25 THE COURT: Right. Okay.



1 MR. BABCOCK: And the reason why we're here, Your  
2 Honor, is that throughout the entire litigation leading up to  
3 the Second Circuit, we were led to believe by New GM by their  
4 admissions that we were a ignition switch defect. In their  
5 pleadings, and as we pointed out to the Court, admissions by a  
6 party during litigation, they're bound by it.

7 THE COURT: Where is your case pending?

8 MR. BABCOCK: The -- where is the case pending now?

9 THE COURT: Yes.

10 MR. BABCOCK: Currently, it's in -- oh, currently,  
11 it's in front of Judge Furman.

12 THE COURT: Okay. And do you have a trial date?

13 MR. BABCOCK: No, Your Honor. Everything's been  
14 stayed, Your Honor. Because the Court wanted Your Honor to --

15 THE COURT: Fine.

16 MR. BABCOCK: -- weigh in on this.

17 THE COURT: Okay. Go ahead.

18 MR. BABCOCK: And so the reason --

19 THE COURT: You're relying on estoppel based on prior  
20 positions that New GM took?

21 MR. BABCOCK: Well, admissions basically. More  
22 forcible than the admission, Your Honor. These -- they took a  
23 position, and very forcibly, that they -- that we were a  
24 pre-ignition switch plaintiff.

25 THE COURT: Okay. But --



1 MR. BABCOCK: And they said we were identical.

2 THE COURT: You used a term that I'm not familiar  
3 with. You referred to it as a pre-ignition switch plaintiff.

4 MR. BABCOCK: No. I'll quote it exactly, Your Honor.  
5 One second here. I'll quote it to you exactly how they have  
6 phrased it. Okay. This is what they said, and I can actually  
7 tell you right where it's from. It's from their GM's response  
8 to no stay pleadings. It's Record Number 13191, paragraph 3  
9 and paragraph 24:

10 "Movant's claims are identical to the ignition  
11 switch pre-closing accident plaintiffs' claims,  
12 and the Court should find the rulings set forth  
13 in the Judgment apply equally to movant."

14 So the point of the matter is they were taking the  
15 position that our claims are exactly -- were not -- were not  
16 exactly.

17 THE COURT: Well, what --

18 MR. BABCOCK: Now they're arguing that we're  
19 non-ignition switch.

20 THE COURT: What was the date of the accident?

21 MR. BABCOCK: The accident took place, I believe, in  
22 2005, Your Honor.

23 THE COURT: Has New GM taken the position that this  
24 was a retained liability to Old GM?

25 MR. BABCOCK: No. Because what they did -- this



1 takes us back to the original ruling from Judge Gerber. They  
2 quoted earlier language from the original sales -- I mean, I  
3 don't mean to get into this earlier ruling because we're not  
4 really here to talk about it. But in the prior matter when we  
5 were before Judge Gerber, they had admitted, and Judge Gerber  
6 concluded as such, that the original sales agreement applied to  
7 my client, and because it was the original sales agreement  
8 language, therefore it was assumed liability.

9 And that's why it went up to -- and that's why Judge  
10 Gerber ruled in my favor because of the fact that in their  
11 answers to the complaints, notice of removals, they had made  
12 affirmative representations and admissions relying upon the  
13 original sales agreement. That's, again, not why we're here  
14 today, but to answer your question, that's why it is -- by  
15 their representations previously, it is assumed liability. But  
16 that is not here today, Your Honor. That's pending on appeal  
17 before Judge Furman. What we're here today is different  
18 admissions. This time they take -- the admissions we're  
19 talking about are the fact that they -- what I just talked  
20 about earlier, about them representing that we were identical.

21 THE COURT: The fact that you say it's pending on  
22 appeal before Judge Furman, at some point Judge Gerber ruled  
23 against you.

24 MR. BABCOCK: No. No. Judge Gerber -- no. Judge  
25 Gerber ruled in our favor. They appealed it. New GM appealed



1 it.

2 THE COURT: Okay. I see.

3 MR. BABCOCK: So it's New GM's appeal, not ours.

4 THE COURT: Okay. Go ahead.

5 MR. BABCOCK: And so we're all -- we're set there for  
6 the time being. The question before the Court today is whether  
7 or not they're obligated now and are estopped through their  
8 admissions to our view otherwise that we are not an ignition  
9 switch pre-closing accident plaintiff. Because they have  
10 stated we were.

11 The only time that changed was when the Second  
12 Circuit came down and suddenly their argument switched. Now  
13 they're claiming we are a non-ignition switch. That's the  
14 first time we were ever even hearing those terms by New GM in  
15 the context of my client's claim was after the Second Circuit.  
16 And that's the reason why Judge Furman presumably sent it back  
17 down to here to decide whether or not their earlier  
18 representations has a binding effect on GM. That is our  
19 position.

20 As far as the other arguments, I'm not -- it's been  
21 argued at great length by other attorneys from the plaintiffs.  
22 For purposes of this, I'm only -- I'm intending to supplement  
23 to talk about what I discussed to Your Honor. And unless Your  
24 Honor has any questions, that's our position.

25 THE COURT: I don't. Okay. Thank you.



1 Other plaintiffs who wish to be heard?

2 MR. BABCOCK: By the way, Your Honor, do you  
3 anticipate any further discussion about this particular issue?  
4 I mean, or --

5 THE COURT: I haven't heard from the other side yet.

6 MR. BABCOCK: Okay.

7 THE COURT: I'm sure I'll hear from Mr. Steinberg  
8 about it.

9 MR. BABCOCK: Thank you, Your Honor.

10 THE COURT: He just raised his hand, so we'll hear  
11 more about it.

12 Mr. Steinberg. I know it's taking it out of order,  
13 but could we deal with Pitterman first?

14 MR. STEINBERG: Sure.

15 THE COURT: Let me ask a couple questions. Maybe it  
16 will shorten it. Maybe not. I'm not precluding you from  
17 arguing further, but do you agree that Pitterman can proceed  
18 with its failure to warn by Old GM against New GM as an assumed  
19 liability?

20 MR. STEINBERG: I do.

21 THE COURT: Okay. Is there anything else you agree  
22 with Mr. Hirsch about that he can proceed on?

23 MR. STEINBERG: No. Yeah. I do agree with him. He  
24 hasn't moved for punitive damages. His --

25 THE COURT: Okay. I figured that. That was clear.





1 You said no punitive damages. What's your position on the  
2 failure to recall retrofit? Distilled down, I understand his  
3 argument to be that Connecticut law recognizes as a product  
4 liability claim a failure to recall or retrofit, and his  
5 argument is, subject to what Judge Hall decides is a matter of  
6 state law, he's entitled to proceed with his failure to recall  
7 retrofit by Old GM as an assumed liability of New GM. Do you  
8 agree or disagree?

9 MR. STEINBERG: I disagree.

10 THE COURT: Okay.

11 MR. STEINBERG: First --

12 THE COURT: Well, let's just make sure I've got the  
13 table set. Subject to what state law would permit in  
14 Connecticut -- I guess it was probably automatically followed.  
15 I was going to say a failure -- do you believe that Pitterman  
16 has stated a claim against New GM as an independent claim for  
17 failure to recall or retrofit?

18 MR. STEINBERG: I do not.

19 THE COURT: Okay. All right. At least I know  
20 what -- I'll see what you have to say about this.

21 MR. STEINBERG: Your Honor, with regard to Pitterman,  
22 just to lay the groundwork, they got notice of the September  
23 2015 scheduling order. They're not seeking punitive damages.  
24 They've agreed to, in effect, strike the reckless disregard  
25 allegation in their complaint to the extent that it is for



1 purposes of seeking punitive damages. They've agreed to strike  
2 the successor allegation that's in their complaint. Their car  
3 was never the subject of a recall, and we have agreed that the  
4 duty to warn can be an assumed liability.

5 Judge Gerber in the December judgment in paragraphs  
6 21 and 29 determined that duty to recall is not an assumed  
7 liability. We believe that that is the final ruling on that  
8 matter, and that the Pitterman Plaintiffs who were notified of  
9 the scheduling order are bound by that ruling and they failed  
10 to appeal, and it's res judicata to them. Now the reason why -  
11 - and I think the Pitterman Plaintiff --

12 THE COURT: And you say that that's the answer no  
13 matter what state law provides?

14 MR. STEINBERG: That's correct.

15 THE COURT: If 48 out of 50 states would recognize as  
16 a products liability claim a failure to recall or retrofit,  
17 it's too bad?

18 MR. STEINBERG: That's correct. And the reason why  
19 is that New GM's obligation to assume product liabilities has  
20 specific language. And the only thing in the sale agreement  
21 that references the duty to recall is Section 6.15, which is  
22 the covenant to comply with the federal statute to recall Old  
23 GM's vehicles if there's a safety defect. That was taken out  
24 of the assumed liability section. So we have consistently  
25 argued for the years in this case that the recall obligation



1 was never an assumed liability and therefore was never subsumed  
2 as part of an assumed product liability case.

3           The second thing is is that Connecticut law actually  
4 recognizes potentially misrepresentation as part of the assumed  
5 -- as part of a product liability case. Judge Gerber clearly  
6 decided in the December decision that misrepresentation claims  
7 are not assumed liabilities, either. So when New GM assumed  
8 product liabilities, it was to recompense accident victims  
9 arising out of injuries, but that didn't mean that everything  
10 that normally could be asserted in a product liability case can  
11 be asserted here. They have the ability to show that there was  
12 a defect. They have the ability to establish a duty to warn  
13 for that defect. They have the ability to get compensatory  
14 damages for that. This is an issue that permeates a lot of  
15 other cases.

16           THE COURT: Okay. Let me, just so I'm clear and the  
17 record is clear -- because I'm going to have again -- as I did  
18 last time, I'm going to have you order a transcript from  
19 today's hearings. What provisions of the sale agreement are  
20 you relying on as limiting the claims as to which New GM  
21 assumed liability?

22           MR. STEINBERG: Section 2.3(a) is the section of the  
23 sale agreement that lists the assumed liabilities of New GM.  
24 And the section -- the sales agreement is structured so that if  
25 you're not specifically listed as an assumed liability,



1 everything else is a retained liability. So unless there are  
2 three -- they are identified in Section 2.3(a), it's our view  
3 that it's a retained liability, putting aside the independent  
4 claim issue.

5 The -- in context of these vehicle owners suing, the  
6 three general areas that have been identified as assumed  
7 products liabilities -- and I think either fortunately or  
8 unfortunately the only assumed liability I think you need to  
9 really deal with now is the product liability accident type  
10 cases. The other two provisions, which were more relevant at  
11 the beginning of the period after the sale, was what we called  
12 the glove box warranty. It's the three years, 36,000 --

13 THE COURT: I know.

14 MR. STEINBERG: -- miles and the lemon law claims.  
15 So if --

16 THE COURT: Could you --

17 MR. STEINBERG: -- fit within those three categories.

18 THE COURT: Could you read to me Section 2.3(a)?

19 See, because your position is -- because what we're dealing  
20 with now, what Mr. Hirsch is saying, he wants to proceed with  
21 product liability claims where liability has expressly been  
22 assumed by contract. Your position is that only those things  
23 specifically listed in 2.3(a) are assumed liabilities.  
24 Everything else is retained liability, correct?

25 MR. STEINBERG: That's correct.



1 THE COURT: So read me the language.

2 MR. STEINBERG: Your Honor, would it be easier if I  
3 just handed it up --

4 THE COURT: Probably would.

5 MR. STEINBERG: -- the paragraph? Because it is  
6 about --

7 THE COURT: Is it long?

8 MR. STEINBERG: -- about 15 sentences. So I think --

9 THE COURT: Does Mr. Hirsch have that too?

10 MR. HIRSCH: No. That's not -- is that the agreement  
11 or is that a brief?

12 MR. STEINBERG: This is a sale agreement. This is  
13 the amended sale agreement.

14 MR. HIRSCH: I'm looking at the sale agreement here.  
15 So all right. Let's see what you got.

16 THE COURT: What page are we on, Mr. Steinberg? Do  
17 you know your page numbers?

18 MR. STEINBERG: Counsel for Mr. Pillars is probably  
19 smiling at this point. It's the first amendment, amended and  
20 restated master sale and purchase agreement dated as of June  
21 30, 2009. It is on page 2, and it's the specific language  
22 amendment at 2.3(a)(ix) of the purchase agreement.

23 THE COURT: 2.3(a)(ix)?

24 MR. STEINBERG: 2.3(a)(ix).

25 THE COURT: So is this document 2968-2 in the Court's



1 ECF system?

2 MR. STEINBERG: I don't know exactly.

3 THE COURT: That's what I have.

4 (Counsel confer)

5 THE COURT: Just give me -- compare, Okay?

6 MR. STEINBERG: All right.

7 THE COURT: I want you on the same page.

8 (Pause)

9 MR. HIRSCH: So, Your Honor --

10 THE COURT: Do you have the page?

11 MR. STEINBERG: I have a page. It doesn't match that  
12 page, so I don't which page is which.

13 THE COURT: Let me see it, Mr. Steinberg.

14 Mr. Steinberg, you're representing that what you're showing me  
15 is the sale agreement, which is ECF Docket Number 2968-2,  
16 and --

17 MR. STEINBERG: I'm representing, Your Honor, that  
18 this is the version of the sale agreement that was attached to  
19 the sale order which Judge Gerber approved. And there's an  
20 amendment to the specific section on product liability.

21 THE COURT: Okay. Just stop a second. It's in this  
22 ECF 2968-2, filed July 5th, 2009. It's page 112 of 132 on the  
23 ECF number. Okay. And you want me to read Romanette ix?

24 MR. STEINBERG: That's correct.

25 THE COURT: All right.



1 (Pause in proceedings)

2 THE COURT: So I read it three times, and now you  
3 need to explain your argument to me. Because cutting through  
4 some of the words, it looks like, "New GM assumed all  
5 liabilities to third parties for death, personal injury, or  
6 other injury to persons or damage to property caused by motor  
7 vehicles designed by sellers, Old GM, collectively product  
8 liabilities, which arise directly out of" -- GAP, et cetera --  
9 "from such motor vehicle's operation or performance."  
10 Those seem to me to be the operative words. Do you disagree?

11 MR. STEINBERG: No.

12 THE COURT: So why doesn't Mr. Hirsch's assertion of  
13 a failure to recall or retrofit -- if the car had a defect that  
14 led to its -- allegedly resulted in this accident, I don't see  
15 anything in this language you pointed me to that would --  
16 certainly not by express terms. It doesn't say what fits into  
17 "products liability" -- you have a defined term, "product  
18 liabilities." But I don't see -- I thought you were going to  
19 show me language that excluded certain types of claims from  
20 product liabilities, and I don't see that.

21 MR. STEINBERG: I don't think that there's language  
22 that excludes certain assumed product liabilities. There is  
23 Section 6.15 of the sale agreement, which you would find in the  
24 original version of the sale agreement, which is here, but I  
25 can point --



1 THE COURT: Okay. Well, I guess what I'm saying,  
2 Mr. Steinberg, is what you've shown me in Section 2.3(a)(ix)  
3 doesn't appear to me to support your argument. What are you  
4 showing me now?

5 MR. STEINBERG: Section 6.15(a) of the sale  
6 agreement.

7 THE COURT: Just stop. For the record, I'm on ECF  
8 Docket Number 2968-2, page 74 of 132, Section 6.15, "Product  
9 Certification, Recall and Warranty Claims." All right. Do I  
10 have to read all three, A, B and C?

11 MR. STEINBERG: No, just A.

12 (Pause)

13 THE COURT: Okay. So, New GM was supposed to comply  
14 with certification reporting and recall requirements of the  
15 National Traffic and Motor Vehicle Safety Act and some other  
16 acts?

17 MR. STEINBERG: That's correct. That's the recall  
18 obligation.

19 THE COURT: But it doesn't say that if state law  
20 recognizes as a product liability claim the duty to  
21 recall/retrofit that -- that's not part of assumed liabilities.

22 MR. STEINBERG: State law only recognizes the duty to  
23 recall on the manufacturer.

24 THE COURT: Wait. Wait, wait, wait. I'm not going  
25 to decide that, Mr. Steinberg. Judge Hall is going to be the





1 one to decide what Connecticut law recognizes as a product  
2 liability claim. That ought to be crystal clear to everybody  
3 here. I am not determining what state law permits -- what the  
4 elements of a state law cause of action. I'll decide whether  
5 something in the sale order -- sale agreement here or the sale  
6 order says that's not an assumed liability.

7 But it seems to me entirely separate when you show me  
8 something in paragraph 6 about New GM assuming responsibility  
9 for certification, recall notices, under a whole variety of  
10 statutes, and saying that that somehow prevents the assertion  
11 of a recognized Connecticut state law cause of action for  
12 product liability. I don't know whether Connecticut recognizes  
13 it or not. You can go fight about that before Judge Hall.

14 MR. STEINBERG: Judge Gerber did make that  
15 determination, though, in the December judgment. He did find  
16 in paragraph 21 that --

17 THE COURT: I'm going to go read paragraphs 21 and  
18 29.

19 MR. STEINBERG: Right.

20 THE COURT: Those are the two paragraphs --

21 MR. STEINBERG: Right. So he did explicitly say  
22 that, and there's a ruling on that and there's a failure to  
23 appeal. And I know Your Honor does not want to get into the  
24 weeds of Connecticut law, and so I'm going to avoid that other  
25 than to say that not all things under state law that would



1 otherwise be subsumed as product liability was something that  
2 falls within that section. If --

3 THE COURT: Where am I supposed to find that? It's  
4 not there. You're putting a -- you're seeking to give an  
5 interpretation to the meaning of a defined term, "products  
6 liability" -- "product liabilities" in Section 2.3(a)(ix)  
7 that's not in there.

8 MR. STEINBERG: Except for the structure of the  
9 agreement which breaks out the recall covenant into a separate  
10 section that's not in the assumed liability provision --

11 THE COURT: It certainly seems to me that New GM  
12 agreeing that it will comply with certification, recall  
13 obligations under a variety of federal statutes is not the same  
14 thing as saying whether it's assuming products liability claims  
15 under state law. Those are the two sections you're relying on.

16 MR. STEINBERG: Right. Paragraphs 21 and 29. That  
17 matter has been determined.

18 THE COURT: Okay. Go ahead.

19 MR. STEINBERG: With regard to the demand letter that  
20 we sent to Judge Gerber -- the demand letter. With regard to  
21 the other claims letter that we sent to Judge Gerber, under the  
22 paragraph "Failure to Recall and Retrofit," and we said -- not  
23 that we were only taking on New GM's obligations but not Old  
24 GM's obligations. The precise language was that:

25 "These claims allege that New GM had a duty to recall



1 or retrofit Old GM vehicles. But such claims if they  
2 exist as a matter of law at all are retained  
3 liabilities once New GM purchased Old GM's assets  
4 free and clear of claims and obligations relating to  
5 Old GM vehicles. New GM, an entity that did not  
6 manufacture or sell the Old GM vehicle at issue, did  
7 not have an ongoing duty to Old GM vehicle owners  
8 other than specific assumed liabilities."

9 THE COURT: Can your letter to Judge Gerber change  
10 the terms of a contract?

11 MR. STEINBERG: Oh, I think this was our position  
12 with the interpretation of the --

13 THE COURT: Yes, but my question to you is can a  
14 letter to the -- did you serve Mr. Hirsch with that letter?

15 MR. STEINBERG: Yes.

16 THE COURT: Mr. Hirsch, did you get that letter?

17 MR. HIRSCH: Yes, Your Honor, but that letter --

18 THE COURT: I just asked if you got it.

19 I don't see how a letter to -- I get lots of letters.  
20 I don't see how a letter to the court can alter contractual  
21 terms that were approved by the court.

22 MR. STEINBERG: I don't disagree. All I was trying  
23 to address was Mr. Hirsch's argument that the other claims  
24 letter that we sent did not specifically address the issue as  
25 to whether New GM would be liable for Old GM's failure to



1 recall. I was reading you the language to say that the  
2 language was broad enough to subsume that. I wasn't trying to  
3 say that that language changes any of the sale agreement, but  
4 that what we had notified them of was the broader concept. And  
5 that's what I was trying to say when I wrote that letter.

6 THE COURT: Okay.

7 MR. STEINBERG: The other thing is that this case is  
8 really on the duty to -- whether the recall was an assumed  
9 liability was very much like the Old Carco case that we sent to  
10 Your Honor which is the Grimstad v. FCA case, which is where  
11 Judge Bernstein had ruled that there was no obligation to  
12 recall unless New GM failed to satisfy its obligations under  
13 the National Traffic and Motor Vehicle Safety Act or New GM  
14 incurred a new duty post-sale to plaintiff when it fixed the  
15 vehicle pursuant to the recall. Neither of those things  
16 happened --

17 THE COURT: What state law was he deciding?

18 MR. STEINBERG: I'm not sure.

19 THE COURT: My question is -- and I read Judge  
20 Bernstein's decision before you attached it, when he decided  
21 it, so --

22 MR. STEINBERG: I don't think --

23 THE COURT: A characteristically good decision by  
24 Judge Bernstein. But the question I have is was he deciding  
25 that it doesn't matter what state law provides?



1 MR. STEINBERG: I think that's the case. I think he  
2 did that as an interpretation of the Chrysler sale agreement,  
3 which in this respect was the same as the GM provision.

4 THE COURT: You say the Chrysler language is exactly  
5 the same as 2.3(a)(ix)?

6 MR. STEINBERG: No, I doubt I would say that, because  
7 that's a tortured language that if Your Honor struggled to read  
8 it, then I understand that, because I've read that many times.  
9 But it is not -- it is not the precise language, but in this  
10 particular case the dynamic was Chrysler does its sale before  
11 the GM sale, and then the provision for assuming accident cases  
12 gets amended by Chrysler after the GM sale.

13 THE COURT: Okay. But I assume you would agree with  
14 me that New GM could contractually agree to assume liability  
15 for state law product liabilities claims. And if the state  
16 being Connecticut includes failure to recall/retrofit within  
17 its state law of product liability, that New GM could agree to  
18 do that?

19 MR. STEINBERG: I agree.

20 THE COURT: And so really the issue here, isn't it  
21 whether New GM assumed -- agreed to assume liability for what  
22 Connecticut defines as a product liability claim?

23 MR. STEINBERG: I think with regard to an overall  
24 recall obligation, as a matter of the interpretation of the  
25 sale agreement, New GM agreed to comply with the federal



1 statute. And that was the entirety of its obligation to the  
2 recall --

3 THE COURT: I don't see a disclaimer that it does not  
4 assume liability for any other state law imposed duty to  
5 recall.

6 MR. STEINBERG: That's correct. There is no  
7 disclaimer. It's just the structure -- it's just the structure  
8 of an agreement --

9 THE COURT: Okay.

10 MR. STEINBERG: -- that parks the recall obligation  
11 outside of the assumed liability section of the sale agreement.  
12 And then it's a contractual interpretation of what the parties  
13 intended -- parties between Old GM and New GM had intended.  
14 What was the extent to which New GM had agreed with respect to  
15 assumed product liabilities; in other words, picking up the  
16 recall --

17 THE COURT: I'm giving both sides a hard time here.  
18 I understand your arguments.

19 MR. STEINBERG: I think, Your Honor, though, that on  
20 the independent claims argument, I think with regard to both  
21 duty to recall and duty to warn, that the complaint that has  
22 been filed in this case does not use in any way the words  
23 "independent claim," but frankly, does not allege any New GM  
24 conduct at all.

25 THE COURT: You can order the transcript, but it



1 seems to me that Mr. Hirsch, at least before me, was quite  
2 clear. Whether Judge Hall was satisfied with it or not,  
3 different issue. But I thought he was quite clear that other  
4 than the assumed liability claims, the claims against New GM  
5 are based solely upon New GM's conduct. You heard the same  
6 thing that I did --

7 MR. STEINBERG: I did, and I'm saying to Your Honor  
8 that the complaint that was filed alleges no New GM conduct,  
9 only alleges Old GM conduct, and specifically --

10 THE COURT: Okay. But I take it as a concession by  
11 Mr. Hirsch that he is not going to and may not proceed on  
12 claims against New GM other than assigned -- assumed claims,  
13 other than assumed claims, and claims based solely on New GM  
14 conduct.

15 Do I have that right, Mr. Hirsch?

16 MR. HIRSCH: Your Honor, yes. And what I would like  
17 to point out --

18 THE COURT: I understood you that way. Go up to the  
19 microphone so we have a clear -- there will be a transcript.

20 MR. HIRSCH: So we have alleged, Your Honor, and  
21 perhaps not --

22 THE COURT: Stay there, Mr. Steinberg.

23 MR. HIRSCH: We have alleged, and perhaps not as  
24 eloquently as they would like, and I'm happy to amend it if  
25 necessary, that despite this knowledge and the knowledge of



1 numerous roll-away incidents, GMC -- that's Old GM, and  
2 defendant, that's New GM, took no steps to directly notify  
3 and/or warn owners of the public of these defects.

4 THE COURT: That strikes me that you're trying to  
5 bootstrap a claim against New GM based on Old GM conduct.

6 MR. HIRSCH: No, no. And I'm happy to separate that  
7 into two separate paragraphs.

8 THE COURT: I'm going to leave it to Judge Hall to  
9 decide whether you have adequately pleaded a claim against New  
10 GM based solely on its own conduct without attempting to  
11 bootstrap based on Old GM conduct. I'm not getting into  
12 rewriting your complaint. What I'm saying is -- what you just  
13 read to me certainly sounds as if this is another effort to  
14 assert a claim against New GM based on Old GM conduct. And you  
15 agree, you're not going to do that.

16 MR. HIRSCH: I'm not going to do that. And I will  
17 amend -- and with Judge Hall's permission, I would amend the  
18 complaint to make it clear that against New GM, it's based on  
19 New GM's conduct.

20 THE COURT: Mr. Steinberg, are you satisfied with  
21 that representation?

22 MR. STEINBERG: Well, I understand the  
23 representation --

24 THE COURT: Come up a little closer to the  
25 microphone.





1 MR. STEINBERG: I understand the representation, but  
2 his ability to amend the complaint that is prior -- like six  
3 weeks before trial, is something that I'll let the state court  
4 litigants deal with. But I'm not going to --

5 THE COURT: That's not for me to decide either.

6 MR. STEINBERG: Right. But --

7 THE COURT: I always have qualms about permitting an  
8 amendment to a complaint shortly before trial.

9 MR. STEINBERG: But Your Honor was putting your  
10 finger exactly on this. There is no actual conduct that New GM  
11 committed that he will even be able to say that New GM did  
12 vis-a-vis this customer, other than they didn't act. In the  
13 same way that Old GM didn't act. And that depends on whether  
14 New GM actually had a duty to --

15 THE COURT: Yes, it does. And that seems to me to be  
16 a question of state law. Does Connecticut law impose a duty on  
17 New GM if it has knowledge of a defect, to either give notice,  
18 recall, whatever? I'm not -- I have no clue whether  
19 Connecticut law provides for that. But I understand Mr. Hirsch  
20 to be saying that's what -- that's the claim he wants to  
21 proceed on against New GM, based solely on New GM conduct.  
22 Whether Connecticut imposes that duty on New GM or not, I have  
23 no idea whatsoever.

24 MR. STEINBERG: The problem, Your Honor, in  
25 approaching it this way is that New GM has assumed the product



1 liability claim, has assumed Old GM's conduct in the context --

2 THE COURT: He's going to get his evidence in of Old  
3 GM's conduct because of the duty to warn claim --

4 MR. STEINBERG: That's correct.

5 THE COURT: -- that we agree --

6 MR. STEINBERG: That's correct. And generally, by  
7 the way, Your Honor, this whole issue about independent claims  
8 is a back door to punitive damages. That's the only reason why  
9 anybody fights over it. And that's not relevant to this case.  
10 This dispute that we're having here is over the --

11 THE COURT: But let's deal with the dispute we have  
12 here and not the other --

13 MR. STEINBERG: Right. The dispute we're having here  
14 is that technically he has not alleged anything that looks like  
15 an independent claim. The complaint, which I don't know  
16 whether it's part of the record here, but I do have in my  
17 mind --

18 THE COURT: Let me ask you this. Do you agree that  
19 Mr. Hirsch on behalf of his clients would be entitled to  
20 proceed on -- against New GM on independent claims --

21 MR. STEINBERG: No.

22 THE COURT: -- not based on Old GM conduct. Do you  
23 agree?

24 MR. STEINBERG: Based on Old GM conduct?

25 MR. HIRSCH: New GM.



1 THE COURT: No, not based on Old GM conduct.

2 MR. STEINBERG: No.

3 THE COURT: Maybe I misspoke.

4 MR. STEINBERG: He's a non-ignition switch  
5 post-closing accident plaintiff, who under paragraph 14 of the  
6 December judgment is not supposed to assert independent claims.

7 MR. HIRSCH: This is the problem I'm having. Ten  
8 minutes ago I was told it wasn't an independent claim. Now I'm  
9 being told I can't assert an independent claim. And I have a  
10 Second Circuit that says I can assert an --

11 THE COURT: Okay. Stop. I'll issue an order.  
12 You're on shaky ground on independent claims after the Second  
13 Circuit decision, Mr. Steinberg. I'm not ruling from the  
14 bench, and you'll address -- in response to the other  
15 arguments, you'll have your chance to address it further, but  
16 -- let me save it for that.

17 Thank you, Mr. Hirsch. I'm going to -- I understand  
18 the need -- I probably will issue a separate order with respect  
19 to your case because of the imminent trial date. And so it  
20 will not await a decision on the -- more generally on the 2016  
21 threshold issues.

22 MR. HIRSCH: Thank you very much, Your Honor.

23 THE COURT: Okay.

24 MR. HIRSCH: May I make a 10-second comment?

25 THE COURT: No. I've heard enough about this. Okay?



1 Thank you, Mr. Hirsch.

2 All right, Mr. Steinberg. Go ahead and proceed with  
3 the rest of your argument.

4 MR. STEINBERG: Your Honor, I want to first talk  
5 about the arguments that were made with regard to threshold  
6 issue number two, which is the ability of non-ignition switch  
7 plaintiffs to -- and non-ignition switch post-closing accident  
8 plaintiffs, to assert an independent claim in light of the  
9 paragraph 14 of the December judgment. And paragraph 14 is  
10 explicit on this point, and it's clear. It says:

11 "Plaintiffs of two types, plaintiffs whose claims  
12 arise in connection with vehicles without the  
13 ignition switch defect, and pre-closing accident  
14 plaintiffs, are not entitled to assert independent  
15 claims against New GM with respect to vehicles  
16 manufactured and first sold by Old GM."

17 That is a definitive ruling about the rights of  
18 parties that were not involved in the April decision and the  
19 June judgment. Despite what Mr. Peller says, the bankruptcy  
20 court ruled that it was deferring issues on non-ignition switch  
21 plaintiffs, that being the economic loss plaintiffs, wasn't  
22 even dealing with post-closing accident plaintiffs as part of  
23 those decisions which ultimately went up to the Second Circuit.

24 The issues with regard to post-closing accident  
25 plaintiffs are clearly outside of the June judgment; and,



1 frankly, the non-ignition switch plaintiffs rulings were  
2 outside of what Bankruptcy Judge Gerber ruled, because he said  
3 he was deferring ruling on those issues.

4 THE COURT: From my comments at the last hearing, I  
5 think you know that I'm -- a big problem I'm having is whether  
6 he really decided issues with respect to non-ignition switch  
7 plaintiffs, economic loss, accident whatever, in the November  
8 decision and December judgment, and whether parties were given  
9 notice that those issues were going to be addressed. I'm  
10 having -- that's what I'm really having problems with.

11 MR. STEINBERG: I think I can address that as part of  
12 my presentation, but the point that I was trying to make now  
13 was that the June judgment did not deal with the rights of  
14 non-ignition switch plaintiffs.

15 THE COURT: That's clear.

16 MR. STEINBERG: And so I will address shortly why I  
17 thought -- why I believed that those rights were properly teed  
18 up as part of the September scheduling order while everybody  
19 knew about it. Certainly the people on this side of the table  
20 knew about it. And certainly the lead counsel in the MDL knew  
21 about that, and they clearly participated in all of those  
22 proceedings, endorsed the procedures that have been set,  
23 recognized the ruling, and failed to appear.

24 But let me try to take one step back to try to give  
25 Your Honor a little better color about this issue. In the June



1 judgment, Judge Gerber recognized that the issues of  
2 non-ignition switch plaintiffs' economic loss had to be dealt  
3 with. And so the procedures that were set forth in the June  
4 judgment tried to establish a process upon which what otherwise  
5 would have been a stare decisis ruling, which is what he ruled  
6 in the May 27th decision that I think Mr. Steel read to you,  
7 how he can convert that into the same type of collateral  
8 estoppel ruling that had been applied to ignition switch  
9 plaintiffs.

10 THE COURT: Correctly or incorrectly, what it seemed  
11 to me Judge Gerber was doing was saying I'm going to deal with  
12 the ignition switch plaintiffs first. If I decide that they've  
13 established a due process violation but they're not entitled to  
14 any remedy, that's going to necessarily follow if they're  
15 non-ignition switch plaintiffs as well.

16 So he said I'm going to defer the non-ignition switch  
17 plaintiffs because I don't need to get to it. I'll deal with  
18 the -- let me deal with the ignition switch plaintiffs first  
19 because, as he found there was a due process violation. And  
20 then the issue is what remedy. And he concluded no remedy and  
21 the Second Circuit disagreed.

22 But if that was -- that's the way I'm reading the  
23 record of what happened --

24 MR. STEINBERG: I don't think that's right.

25 THE COURT: He said I don't have to deal with the



1 non-ignition switch plaintiffs until after I -- it makes sense  
2 to deal with the ignition switch plaintiffs first. If they get  
3 no remedy, then clearly the non-ignition switch plaintiffs get  
4 no remedy.

5 MR. STEINBERG: I think that there is an element of  
6 what you said that is true, the conclusion that you reach. But  
7 that's not the reason why Judge Gerber got the way -- he got --  
8 that's not the reason why he got there.

9 THE COURT: You've got to show me words and the  
10 opinion --

11 MR. STEINBERG: Yeah. I think Judge Gerber decided  
12 -- was concerned about whether he can decide this on a  
13 stipulated factual record. The stipulated factual record that  
14 had been developed in this case only related to, or primarily  
15 related to, the ignition switch plaintiff side of the equation.

16 There was a motion to enforce that was filed in April  
17 of 2014, and then there were two motions to enforce that were  
18 filed on August 1, 2014. The definitions of ignition switch  
19 plaintiff and non-ignition switch plaintiff are derived from  
20 the fact that those motions were filed at different times. The  
21 first motion only dealt with the February/March recall. That's  
22 the defined term that everybody understood as ignition switch  
23 plaintiffs --

24 THE COURT: There doesn't seem to be a dispute about  
25 that.



1 MR. STEINBERG: And that is the economic loss case.  
2 Because that was the first cases that we brought. The GM had  
3 enacted a program that was monitored -- that was administered  
4 by Ken Feinberg to try to deal with the pre-sale ignition  
5 switch accident cases. Many, in fact most, of those cases were  
6 resolved, but not all. Those that had not been resolved became  
7 the subject of a pre-closing accident plaintiff, which applied  
8 both to ignition switch and non-ignition switch. That was one  
9 of the August 1 motions.

10 The other was we were seeing additional economic loss  
11 cases that were being filed based on the recalls that came  
12 after March of 2014, and that was defined as the non-ignition  
13 switch plaintiff cases.

14 The factual record that was developed in this case  
15 was primarily developed through the Valukas report. The  
16 Valukas report was rendered towards the end of May of 2014, and  
17 only dealt with the February and March 2014 recalls, didn't  
18 deal with anything else.

19 One of the things that you heard this morning was  
20 should there be discovery or not be discovery. Mr. Weisfelner  
21 and I both agreed that we could probably decide the threshold  
22 issues relating to these cases without the need of further  
23 discovery. And the Groman plaintiffs, I don't think it was the  
24 Peller plaintiffs, the Groman plaintiffs said we need to have  
25 discovery. And part of it was that they were trying to assert





1 the fraud on the court claim in their complaint, and they  
2 thought we needed to have discovery on that, and Judge Gerber  
3 said I'll only rule on the legal standard so you can avoid the  
4 discovery issue.

5           When he said he was going to render his decision, he  
6 said that I will see whether I can decide these -- make my  
7 rulings on the threshold issues on the stipulated factual  
8 record, almost like a summary judgment motion. If I feel that  
9 there are material disputed factual issues that would prevent  
10 me from doing that, then I will tackle the discovery issue.  
11 But otherwise I will try to rule on that based on your  
12 stipulated factual record. And we had thought, GM had thought,  
13 that the factual record was broad enough to cover those issues  
14 subsumed by non-ignition switch, whether it was pre-sale  
15 accident or economic loss.

16           When Judge Gerber rendered his April 15 decision, he  
17 decided that the factual record wasn't sufficiently developed.  
18 And that's the reason why he broke out non-ignition switch  
19 plaintiffs. But it wasn't because he wasn't ultimately  
20 concerned about getting final rulings for non-ignition switch  
21 plaintiffs.

22           And that's why the June judgment has paragraph 13,  
23 which is that he had determined that those rulings would  
24 otherwise be stare decisis, because he thought they were in a  
25 similar position, but he figured that if anybody else had a



1 concern, that it should not be stare decisis, he would let the  
2 file in 17 business days an objection and pleading.

3 And we had a schedule and we sent out the June  
4 judgment. Some people raised the note -- the no strike  
5 pleading. Many of the non-ignition switch plaintiffs actually  
6 didn't do anything. And therefore, they recognized that  
7 whatever the ruling is would have been stare decisis. And  
8 those people who were outside of the MDL actually did not  
9 appeal.

10 But Judge Gerber wanted to get to a ruling on that.  
11 And then what happened was the MDL economic loss plaintiffs  
12 decided that they were going to try to comply with Judge  
13 Gerber's decision by amending their complaint. And that  
14 became, instead of the first amended consolidated complaint,  
15 that became the second amended consolidated complaint, and they  
16 got rid of the pre-sale separate complaint and they merged it  
17 into one, and they immediately moved to withdraw the reference  
18 so that Judge Furman can effect take control of this case.

19 Judge Furman in a --

20 THE COURT: Sounds like a good idea.

21 MR. STEINBERG: In a litigated matter, Judge Furman  
22 decided that these issues should be going back to the  
23 bankruptcy court. And so what happened was that you had a June  
24 judgment which said I'm going to address the procedures for  
25 non-ignition switch plaintiffs. And what's significant about



1 the June judgment is that in paragraph 13© it specifically says  
2 that if you're going to put, make and file a no-dismissal  
3 pleading, I'd like you to tell me whether you need a designated  
4 counsel to address your four threshold issues, and tell me  
5 whether you need a briefing schedule, and tell me whether you  
6 need discovery.

7           So, Judge Gerber was cognizant of the rights of  
8 non-ignition switch plaintiffs and put the burden on the  
9 non-ignition switches to say if you think you need discovery,  
10 with respect to any issue that you think is appropriate to  
11 determine whether you have rights or not, I need to know that.

12           So then you have the amendment of the complaint going  
13 up to Judge Furman, and then coming back to Judge Gerber. And  
14 then Judge Gerber, when he gets it back from Judge Furman,  
15 tenders his August 19th order. It's his case management order.  
16 And Judge Gerber says I need to know certain things from the  
17 parties, about how I'm going to take control of this case based  
18 on the relatively unsettled process of where we were at.

19           And specifically he said a couple of things in that  
20 August 19th order. And in the book that we gave you there's  
21 the tab 3. He asks specifically how long it would take to do  
22 marked pleadings, because he wanted to deal with the  
23 granularity of the complaints. He wasn't prepared to deal with  
24 this on a broad-brush issue. He said in paragraph E on page 2  
25 that:



1 "Any alternative suggestions beyond or instead of the  
2 combination of briefs and marked pleadings that the  
3 Court currently envisions as to the best means for  
4 this Court to provide the MDL court and other court  
5 with rulings of the level of specificity they might  
6 need vis-a-vis yet to be decided by this Court."

7 So he wasn't trying to implement the June judgment.  
8 He was trying to deal with the other issues that needed to be  
9 decided. And then he told all the parties and said if you have  
10 any other matters that need to be addressed by this Court, I  
11 need to know that. And then he wasn't sufficient, because he  
12 was concerned about the rights of the non-ignition switch  
13 plaintiffs, accident and economic loss.

14 And in paragraph 2 of his August 19th case management  
15 order, which he said to the parties I want you to appear and  
16 give me an answer, he said:

17 "The Court is in particular need of information with  
18 respect to the non-ignition switch plaintiffs'  
19 claims, whether for injury or death or economic loss,  
20 and pending in future matters affecting them. But so  
21 long as such claims are satisfactorily covered in the  
22 letters to come, they can be addressed in connection  
23 with other claims to the extent appropriate."

24 So Judge Gerber challenged the parties and said I  
25 need you to tell me what issues you need to have resolved in



1 the non-ignition switch plaintiff context. And it's in that  
2 context that you had the colloquy that you referred to with Mr.  
3 Weisfelner and Mr. Weintraub in the courtroom as to how are you  
4 going to address the non-ignition switch plaintiffs.

5 And Judge Gerber said that he was particularly  
6 concerned because while ignition switch plaintiffs have  
7 established a due process violation, and therefore they can  
8 assert independent claims, the non-ignition switch plaintiffs  
9 weren't at that same level. What are you going to do about it?

10 THE COURT: Is there a transcript?

11 MR. STEINBERG: Yes.

12 THE COURT: Do I have it?

13 MR. STEINBERG: I think you do. I think we cite from  
14 it. It's on the ECF system. But I'm happy to provide a  
15 courtesy copy to Your Honor.

16 THE COURT: I would like -- I'd request it.

17 MR. STEINBERG: So Judge Gerber says --

18 THE COURT: Do we have it here? Is that the same  
19 hearing that you quote Mr. --

20 MR. STEINBERG: Yes.

21 THE COURT: -- Weisfelner?

22 MR. STEINBERG: Right.

23 THE COURT: Court's designated counsel, but  
24 Mr. Weisfelner has indicated it --

25 MR. STEINBERG: So Judge Gerber says that I need to



1 know whether -- how you're going to deal with this thing. And  
2 Mr. Weisfelner said if I'm going to tee it up, I understand the  
3 need to have it teed up soon. That was what it was.

4 Now Your Honor put your finger on the scheduling  
5 order. That was actually drafted by the parties. The reason  
6 why it was drafted by the parties is that Judge Gerber made  
7 rulings at the August 31 status conference and asked the  
8 parties to draft an order that embodied his rulings. And  
9 that's what the parties submitted.

10 That participation and submission was made with  
11 myself as counsel and with Mr. -- the designated counsel for  
12 non-ignition switch plaintiffs, and ignition switch plaintiffs,  
13 and whatever role Mr. Weintraub thought he had at that point in  
14 time. And with the participation of lead counsel in the MDL.  
15 Because Mr. Weisfelner was candid, he represents Berman and  
16 Cabraser, who are the economic loss parties in the MDL, and  
17 Mr. Weintraub represents Mr. Hilliard, which are the accident  
18 cases. And where you heard a new phrase, because they don't  
19 want to actually say what the real phrase is.

20 You heard colloquial ignition switch versus the  
21 defined terms that were in the June judgment and in the  
22 December judgment. Colloquial ignition switch are non-ignition  
23 switch cases. That's what they are. And those non-ignition  
24 switch cases, accident cases, are in the MDL. There are 600  
25 and -- over 675 plaintiffs as of September of 2015 that were --



1 that were cases in the MDL for non-ignition switch pre-closing  
2 accident plaintiffs.

3 When we set this procedure down, it was with Mr.  
4 Hilliard through Mr. Weintraub and directly Mr. Hilliard --

5 THE COURT: He filed a notice -- he filed a notice of  
6 appearance? Hilliard?

7 MR. STEINBERG: Weintraub filed it on behalf of --  
8 Mr. Weintraub filed it, saying that he was representing Mr.  
9 Hilliards, and the entire structure of the MDL orders are that  
10 Judge Furman had decided that I want my lead counsel to have  
11 people with specialty in the bankruptcy law because there are  
12 issues that will need to be decided in the bankruptcy case.  
13 And the lead counsel in the MDL is vested with responsibilities  
14 as lead counsel for the cases that are in the MDL to deal with  
15 common issues.

16 Whether they decided they wanted to only protect the  
17 rights of the ignition switch plaintiffs as compared to all of  
18 the plaintiffs, I'm sure that is an issue that people can  
19 quarrel with. But the reality is that the right people were  
20 notified to deal with these issues. And that's what Judge  
21 Gerber recognized. Judge Gerber had recognized that he was  
22 dealing with in effect the MDL counsel and with the people who  
23 the MDL counsel had hired in order to appear in the bankruptcy  
24 proceedings. And that was the notice that went out.

25 We notified 220 plaintiffs. Most of those plaintiffs



1 were not in the MDL. Those were the state court plaintiffs  
2 that were -- that had sued New GM on non-ignition switch  
3 post-closing accident cases. They were part of the  
4 proceedings.

5           You cannot deal with the punitive damage issue  
6 without dealing with non-ignition switch post-closing accident  
7 plaintiffs, as well as ignition switch post-closing accident  
8 plaintiffs, because one of the issues that was involved in  
9 punitive damages was whether New GM had assumed for the  
10 liability for accident cases.

11           So you need to bring in all the plaintiffs that were  
12 part of the accident cases. That's ignition switch and that's  
13 non-ignition switch. They were notified of the matter. And  
14 they got notice of it. And I think it's -- I know Your Honor  
15 is concerned about the notice that was given, and I'd like to  
16 point out two things. One is the scheduling order which Judge  
17 Gerber signed, and then is the letter that the MDL counsel  
18 prepared in order to tee up this process correctly.

19           And I alluded to that in my opening presentation, but  
20 I do think we need to come back and visit it. The letter that  
21 -- the order that Judge Gerber said on page 4 said:

22           "Within two business days of the entry of the  
23 scheduling order, New GM shall serve by either email,  
24 facsimile, overnight or none of the foregoing  
25 available regular mail, a copy of this scheduling





1 order on plaintiffs in any lawsuit where New GM has  
2 previously sent a demand letter as authorized by the  
3 judgment with a cover note that states as follows."

4 And then that's the cover note that everybody's been  
5 referring to. That cover note, which was court sanctioned,  
6 said among other things:

7 "If you have any objection to the procedures set  
8 forth in the scheduling order" -- meaning, if you  
9 don't like what's going on in this case, same way  
10 that you did in the 2016 threshold issues, "you must  
11 file an objection in writing with the bankruptcy  
12 court within three business days of receipt of this  
13 notice. Otherwise you will be bound by the terms of  
14 the scheduling order and the determinations made  
15 pursuant thereto. If you believe there are other  
16 issues that should be presented to the Court relating  
17 to your lawsuit that will not otherwise be briefed  
18 and argued in accordance with the scheduling order,  
19 you must set forth that position with specificity in  
20 your objection."

21 That required everybody getting the scheduling order  
22 to say that if they had another issue, including due process,  
23 because the June judgment and the procedures in paragraph 13  
24 were somehow subsumed by this process in the scheduling order.  
25 If you had a due process concern, you should say something.



1 MDL counsel chose not to do it. It wasn't New GM's burden to  
2 say, hey, by the way do you want to assert a due process.

3 Judge Gerber had said something to that. And Judge  
4 Gerber said are you going to tee it up. And what Mr.  
5 Weisfelner did not say was the explanation as to how he was  
6 going to tee it up. Judge Gerber had said to him if you're  
7 going to tee it up, I need to know it now because I want to get  
8 these issues resolved, and he never gave you an answer as to  
9 why he didn't do it, other than they chose not to do it.

10 One of the arguments that we have made as the  
11 corrections to the statements that were made on April 20th was  
12 that there was active discovery going on in the MDL. People  
13 could have, if there was enough going on with regard to  
14 non-ignition switch plaintiffs, that either could have asserted  
15 the due process violation or said to the judge, "pause,  
16 please," Judge Gerber's expression, I want to be able to  
17 establish that.

18 But at the time of the September scheduling order,  
19 there had been millions, millions of documents produced with  
20 regard to non-ignition switch plaintiffs. And through the end  
21 of the year in 2015, there have been over 100 depositions taken  
22 of New GM employees. And that wasn't just limited to ignition  
23 switch. That was depositions that were taken.

24 THE COURT: Let me ask you. If I assume that Mr.  
25 Weisfelner and the lawyers with whom he was working, the MDL



1 lawyers, made an affirmative decision not to include  
2 non-ignition switch plaintiff due process issues in the  
3 September scheduling order, who is bound by it? Who is bound  
4 by that -- that's why I started today by asking who were his  
5 clients, who are Mr. Weisfelner's clients?

6 MR. STEINBERG: I think anybody in the MDL.

7 THE COURT: Named plaintiffs. But what about -- I  
8 heard some discussion about what about putative class members?  
9 They're not certified. They're not -- would you agree with me  
10 that other than the named plaintiffs no other putative  
11 plaintiffs would be bound by a ruling that Judge Gerber  
12 rendered?

13 MR. STEINBERG: I think there's hundreds of  
14 plaintiffs that are named as the named plaintiffs. I think. I  
15 mean, there's certainly pages and pages of people who are  
16 listed. They list people in every state.

17 THE COURT: Do you agree that anybody who was --  
18 well, first off, is it your view Mr. Weisfelner was  
19 representing every one of the named plaintiffs in every one of  
20 those cases?

21 MR. STEINBERG: I think Mr. Weisfelner was  
22 representing Mr. Berman and Ms. Cabraser as lead counsel in the  
23 MDL.

24 THE COURT: But the question, who are their clients?  
25 So you're saying derivatively Mr. Weisfelner represented



1 whoever Berman, Cabraser represented --

2 MR. STEINBERG: And Berman and Cabraser were actively  
3 involved in litigating these proceedings.

4 THE COURT: But my question now is, is anyone other  
5 than the named plaintiffs represented by Berman and Cabraser,  
6 would they be bound by -- assuming -- and I know it's disputed,  
7 but would they be bound by an affirmative decision by Mr.  
8 Weisfelner not to raise the due -- the non-ignition switch  
9 plaintiff due process issues in the September scheduling order?

10 MR. STEINBERG: I think those plaintiffs plus those  
11 people who either got notice of or were aware of the scheduled  
12 order, they all would be bound.

13 THE COURT: Why is that? You referred to a colloquy  
14 that Mr. Weisfelner and Judge Gerber had. And Mr. Weisfelner  
15 has clients, derivatively, he's got clients. And he can bind  
16 clients. But how does he bind non-clients --

17 MR. STEINBERG: Because we --

18 THE COURT: -- to the extent that there are class  
19 actions that haven't been certified. I can see your argument,  
20 assuming that I get there, that Mr. Weisfelner derivatively  
21 represents every named plaintiff that Berman and Cabraser  
22 represents. So when he speaks in court before Judge Gerber,  
23 that's who he's speaking for. But how does he bind the rest of  
24 the world, or may have cases pending in state courts around the  
25 country. They're not represented by Berman or Cabraser. It



1 may be that the ruling that comes out of it is going to be law  
2 of the case or it's persuasive authority, essentially what I  
3 ruled in the other Motors Liquidation case in denying motions  
4 to dismiss.

5 MR. STEINBERG: I don't think that Mr. Weisfelner  
6 could bind anything more than what Mr. Berman and Ms. Cabraser  
7 could bind.

8 THE COURT: All right.

9 MR. STEINBERG: But the point is, is that other  
10 lawyers who got notice of the scheduling order, the other 200  
11 and some odd people, who were told in the notice that you're  
12 going to be bound by the rulings, and if you fail to raise an  
13 issue that is unique to your case, as something that I need to  
14 consider, they're going to be bound by their failure to raise  
15 those issues --

16 THE COURT: You see, if the order had -- look. If  
17 the scheduled order had gone out and had said that I am going  
18 to address the due process issue or based on the agreement of  
19 designated counsel, there is no issue about due process, I'd  
20 say sure. If you're out there in the hinterlands and you get  
21 that order, and you see it says something one way or the other  
22 about due process, fine. You better get off your duff and come  
23 in and complain if you disagree.

24 But they get a scheduling order that is silent about  
25 the due process. These are the issues that are going to be



1 addressed. This is a scheduling order for how things are going  
2 to proceed. And how is it that you expect lawyers who have not  
3 appeared before Judge Gerber to receive a scheduling order that  
4 says nothing about due process claims of non-ignition switch  
5 plaintiffs and say you're going to be bound if Judge Gerber  
6 decides those issues. That's where I'm having --

7 MR. STEINBERG: I think, Your Honor, the answer is  
8 that the scheduling order says if you believe there are issues  
9 that should be presented to the Court relating to your lawsuit,  
10 there will otherwise be -- that will not otherwise be briefed  
11 and argued in accordance with the scheduling order, you must  
12 set forth that position with specificity in your objection.

13 So the burden was on anybody getting the scheduling  
14 order that if they wanted to raise the due process issue, or  
15 they wanted to raise any other issue that was not specifically  
16 referenced in the scheduling order, they actually had to do  
17 something. That was the way it was state up.

18 The burden on raising a due process violation for a  
19 recall that took place in June of 2014, you know, 14, 15 months  
20 later, after the knowledge of the recall, that burden is on the  
21 plaintiff.

22 THE COURT: All right. I'm looking forward to  
23 getting the transcript of this August hearing and see exactly  
24 -- you have part of it quoted -- you quote designated counsel  
25 in your brief. I've got to see the whole transcript.



1 MR. STEINBERG: Okay. The next thing is the letter  
2 that went out by the MDL counsel in conjunction with the  
3 scheduling order. That letter said in the first line:

4 "This is a court-ordered notification about your case  
5 involving General Motors, LLC. The text in the  
6 attached letter" -- which is the letter that I sent  
7 out, which included the provisions of the scheduling  
8 order -- "is required by the Honorable Robert Gerber  
9 Bankruptcy Judge. If you have any questions about  
10 the procedures, please contact Dawn Barrios,  
11 plaintiffs' liaison counsel to the MDL."

12 She was the person appointed to interface with cases  
13 that were pending against New GM outside of the MDL.

14 "And/or co-lead plaintiff's counsel for the MDL,  
15 Steve Berman, Elizabeth Cabraser and Bob Hilliard,  
16 And they give the cite, and then it says that:

17 "The Bankruptcy Court has modified the deadline  
18 imposed by the judgment dated June 1 to file in  
19 effect the no strike pleading, unless you choose to  
20 object to the procedures in the attached letter or  
21 you wish to file your own papers, and notwithstanding  
22 your right to be covered by the filing that  
23 designated counsel will be making, you have no  
24 required actions in the Bankruptcy Court at this  
25 time."



1           So it told the parties you can rely on what we're  
2 doing, or you need to be able to act. And if you actually  
3 review the transcript, you see the colloquy between Judge  
4 Gerber and Mr. Weintraub who is saying I don't represent these  
5 other people outside the MDL. I only represent Mr. Hilliard.  
6 And I don't want them taking up my pages that I have to write  
7 to Judge Gerber about it. They want to do something. It's  
8 incumbent on them. They should file their briefs.

9           THE COURT: This is in the same August transcript?

10          MR. STEINBERG: Yes. So this procedure was set up to  
11 basically deal with that. And you have to understand the MDL  
12 procedures, that these types of bankruptcy orders work their  
13 way onto the MDL leadership website so that people in the state  
14 courts can monitor what is going on in the case.

15          The goal here by Judge Gerber on a procedure that had  
16 been endorsed by the people who were appearing in front of him  
17 at the time was that this was going to be a comprehensive  
18 procedure that covered everybody.

19          Now I know Your Honor is struggling with the notion  
20 that there was no deadline that said if you don't assert the  
21 due process violation you're going to lose it. But there was a  
22 ruling about the due process violation --

23          THE COURT: As to ignition switch plaintiffs.

24          MR. STEINBERG: As to -- no. As to non-ignition  
25 switch --





1 THE COURT: Where?

2 MR. STEINBERG: Footnote number 70.

3 THE COURT: Okay.

4 MR. STEINBERG: Of the November decision. And where  
5 plaintiffs have distorted the Footnote 70 is that when Judge  
6 Gerber references his former judgment decision, the May  
7 20-something decision, he said that they may never be able to  
8 prove it. Now six months later, he's saying that's it, you  
9 didn't prove it, and you can't assert it.

10 And the reason why that's just not my colloquy of an  
11 interpretation of a judgment, but that actually was the ruling,  
12 was that immediately after that ruling was made, the plaintiffs  
13 in the MDL amended the second amended complaint and put in the  
14 third amended complaint. And the third amended complaint  
15 dropped all non-ignition switch economic loss cases. They knew  
16 that that ruling had prevented them from asserting that, and  
17 they did not appeal that ruling.

18 Your Honor doesn't have to sort of struggle as to did  
19 people know. MDL counsel knew. And MDL counsel did not appeal  
20 that ruling. And that's the three plaintiffs. And that  
21 included also -- and they didn't -- and they didn't appeal not  
22 just on the due process issue. They didn't appeal the punitive  
23 damage ruling. And the punitive damage ruling was clear on its  
24 face. Punitive damage ruling said in paragraph 6 -- paragraph  
25 6, that "New GM did not contractually assume liability for



1 punitive damages from Old GM."

2 But that's not where it stops. That's what they  
3 would like to say where it stops. Next sentence:

4 "Nor is New GM liable for punitive damages based on  
5 Old GM conduct under any other theories such as by  
6 operation of law. Therefore, punitive damages may  
7 not be premised on Old GM knowledge or conduct or  
8 anything else that took place at Old GM."

9 That is the fourth threshold issue, successor  
10 liability is --

11 THE COURT: That's in the judgment or --

12 MR. STEINBERG: That's the December judgment,  
13 paragraph 6. That was not appealed. That is a final ruling  
14 that has nothing to do with the Second Circuit decision or the  
15 June judgment punitive damages wasn't raised at that time.  
16 Post-closing accident plaintiffs were not subject to the June  
17 judgment. They did not appeal. They made the purposeful  
18 decision, for whatever their reason was. You don't have to try  
19 to get into someone's head as to why they didn't do something.  
20 That's what res judicata and finality is about, and they didn't  
21 do that. And it's the same answer with regard to paragraph --

22 THE COURT: Just a second. Is -- that issue was  
23 briefed?

24 MR. STEINBERG: Yes.

25 THE COURT: For the November -- I know it's briefed



1 here, but was that issue briefed by the parties leading to the  
2 November decision?

3 MR. STEINBERG: The issue that was framed in the  
4 September scheduling order --

5 THE COURT: Yes.

6 MR. STEINBERG: -- on punitive damages.

7 THE COURT: Yes.

8 MR. STEINBERG: On page 1 of the scheduling order:

9 "The briefing schedule with respect to the issue  
10 (punitive damage issue) in complaints filed against  
11 General Motors, LLC (New GM) that request  
12 punitive/special/exemplary damages against New GM,  
13 based in any way on the conduct of Motors Liquidation  
14 Co., formerly known as General Motors Corporation  
15 (Old GM) shall be as follows."

16 So the issue that was framed by the scheduling order  
17 was not did you just assume product -- as when you assumed  
18 product liability, did you assume product -- did you assume  
19 punitive damages. It was are you liable for anything relating  
20 to Old GM conduct as punitive damages? Is New GM liable for  
21 Old GM conduct? You don't get to successor liability, it's not  
22 relevant, if you can't look to Old GM conduct.

23 THE COURT: Okay. We're going to take a 15-minute  
24 recess. We're going -- what issues do you still have to  
25 address, Mr. Steinberg?



1 MR. STEINBERG: I haven't responded to any of the  
2 individuals, and I'm still on issue number 2. I apologize for  
3 the --

4 THE COURT: Well, you just talked about issue  
5 number 3.

6 MR. STEINBERG: No. Issue number 3 is used car  
7 purchases.

8 THE COURT: I'm sorry. You just talked about issue  
9 number 4, punitive damages.

10 MR. STEINBERG: I have. I have.

11 THE COURT: You have more to say on issue 4?

12 MR. STEINBERG: I have a few more things to say about  
13 issue 4, but I understand the hour and I will try to accelerate  
14 my --

15 THE COURT: Just so we're clear, we're going to end  
16 at 5:30. We're taking a 15-minute break. We're going to end  
17 at 5:30. As of now, I don't plan to hear any -- what I would  
18 consider to be surrebuttal, because Mr. Steinberg started at  
19 the last hearing and then Mr. Weintraub started but didn't  
20 finish. I've let everybody on the plaintiffs' side say  
21 whatever they wanted to say today. And I consider what Mr.  
22 Steinberg is saying now to be the last word on it. Just so  
23 everybody is clear on what's happening. So we're taking a  
24 15-minute recess.

25 (Recess taken at 4:04 p.m.)



1 (Proceedings resumed at 4:23 p.m.)

2 THE COURT: You may be seated.

3 Go ahead, Mr. Steinberg.

4 MR. STEINBERG: Your Honor, there's been an  
5 undercurrent of statements made in this case that in connection  
6 with proceedings leading to the December judgment that  
7 post-closing accident plaintiffs did not participate. And that  
8 clearly is not true, even on the face of looking at the  
9 December judgment.

10 There is a lengthy section about the impact on the  
11 bellwether complaints. The bellwether complaints are ignition  
12 switch post-closing accident plaintiff cases. There are  
13 references to non-ignition switch post-closing plaintiff cases  
14 in the December judgment.

15 There was an issue raised as to whether anybody  
16 briefed the punitive damage issue other than designated --  
17 other than Mr. Weintraub. The Moore plaintiffs briefed the  
18 punitive damage issue for Judge Gerber as well, too.

19 There was a -- issues raised about "well, they didn't  
20 make up my complaint, so I didn't really have sufficient  
21 notice." I'd just point out to Your Honor that Footnote 2 of  
22 the December judgment specifically says that "any ruling set  
23 forth in the judgment that refers to a particular lawsuit,  
24 complaint and/or plaintiff shall apply equally to all lawsuits,  
25 complaints and plaintiffs where such ruling may be applicable."



1           So, Judge Gerber recognized that there were too many  
2 lawsuits for us to mark up, but there was a commonality of a  
3 lot of the claims. I think when you asked Mr. Weintraub as to  
4 what other type of independent claims that are being asserted  
5 in these post-closing accident cases, he said duty to warn and  
6 duty to recall. Those are -- and then there may be a consumer  
7 protection statute claim. Those are generally the claims that  
8 are common to many of the post-sale accident cases.

9           I had referred to in the MDL the orders that spell  
10 out the duties of lead counsel. And I want to be able to give  
11 those specific orders to Your Honor. The MDL order number 5  
12 says that lead counsel will act for plaintiffs and will focus  
13 on substantive areas including bankruptcy. MDL order 8 says  
14 lead counsel should make sure to have counsel familiar with  
15 bankruptcy law. MDL order 13 lists Bob Hilliard on the MDL  
16 website as the co-lead counsel with primary responsibility for  
17 personal injury claims.

18           The reference to the fact that there were no  
19 non-ignition switch post-closing accident plaintiffs in the  
20 MDL, which is wrong, was made so that it would seem like there  
21 was no participation. And the fact of the matter was, just by  
22 having the lead counsel involved, where there were 679  
23 plaintiffs involved for non-ignition switch post-closing  
24 accident plaintiffs meant that there was a large sample of  
25 these cases there in addition to the separately noticed



1 200-and-so other parties.

2           Your Honor asked Mr. Weisfelner who he represented,  
3 but -- either you had done it before but you didn't do it this  
4 time with regard to who Mr. Weintraub represents. And I think  
5 that's significant. He will tell you that he's not a  
6 designated counsel for the post-closing accident plaintiffs.  
7 He represented Mr. Hilliard for the six bellwether cases, and  
8 then he has three other law firms who have brought litigations  
9 against New GM, none of whom he was representing at the time of  
10 the entry of the December judgment.

11           And when you think about all of the arguments that  
12 he's making, and I assume he can only make arguments on behalf  
13 of his clients, the three law firms that he is representing,  
14 the Butler Wooten firm has two cases. Mr. Butler got the  
15 September scheduling order. Mr. Weintraub wasn't representing  
16 Mr. Butler at the time. One case was -- of the two cases was  
17 started after the December judgment. Neither case involves a  
18 recall. And one of the Butler cases was in active discovery at  
19 the time of the service of the scheduling order.

20           Tad Turner is the second client. He has three cases.  
21 One was commenced after the December judgment. Mr. Turner also  
22 got notice of the September scheduling order, and his cases  
23 don't involve a recall either.

24           And then the third law firm is Denney & Barrett, also  
25 not someone that he represented in the bankruptcy case. Two



1 cases started both after the December judgment. One is  
2 involving a minor, but is in the process of being settled. The  
3 other one is extant.

4           So that his clients other than Mr. Hilliard, for  
5 which all of these arguments are being made about what people  
6 understood or didn't understand, are made on behalf of six  
7 plaintiffs -- or six cases, and not anything greater than that.  
8 A wide body of people didn't complain, haven't come before Your  
9 Honor. There have been a few. I will deal with them here.  
10 But my belief is that anybody who wants to make an assertion  
11 that they were otherwise unaware or they shouldn't be bound  
12 should be required on behalf of themselves to make those  
13 pleadings before Your Honor, and that no one else who doesn't  
14 represent them should be speaking on their behalf.

15           THE COURT: This may be slightly out of order, but --  
16 in terms of the argument. Did New GM object to discovery in  
17 the MDL of knowledge of Old GM of non-ignition switch defects?

18           MR. STEINBERG: No. New GM didn't object to -- but  
19 discovery wasn't set up for that. Discovery was set up was we  
20 have a phase one discovery, a phase two discovery and a phase  
21 three discovery. Phase one discovery didn't involve the  
22 ignition switch recall, but involved other recalls. It was  
23 general discovery.

24           THE COURT: Yeah, but if you believe that Judge  
25 Gerber resolved the issues precluding non-ignition switch





1 plaintiffs from proceeding against New GM, why haven't you  
2 objected to the discovery before Judge Furman about who knew  
3 what when, about the non-ignition switch --

4 MR. STEINBERG: Most of that --

5 THE COURT: Give us the recalls first.

6 MR. STEINBERG: I think, Your Honor, the discovery  
7 that's going on -- if I --

8 THE COURT: You're the one who called that discovery  
9 to my attention in your letter.

10 MR. STEINBERG: Right. You're right. But I think,  
11 Your Honor, that discovery relates to whether they can assert  
12 an independent claim, and they're using the imputation  
13 doctrine --

14 THE COURT: What does Old GM's knowledge about the  
15 defects identified in that list of recalls for so-called  
16 non-ignition switch defects, most of which were ignition switch  
17 related, what does that have to do with asserting independent  
18 claims?

19 MR. STEINBERG: They argue that as -- and I think  
20 Your Honor put your finger on it as sort of a back door basis.  
21 They argue the imputation doctrine, which is that Old GM's  
22 knowledge when those people were then hired by New GM was  
23 imputed to New GM, and therefore those people have -- those  
24 people's knowledge will then constitute some kind of  
25 independent claim based on a failure to warn and some other



1 sort of statute. But on the non-ignition switch side, it's  
2 asserted that way.

3 But Your Honor I think is sort of piecemealing it as  
4 compared to what has actually happened in the MDL. The MDL is  
5 allowing discovery to go forward on certain recalls, and then  
6 they're allowing -- they're allowing depositions to go forward  
7 with certain recalls --

8 THE COURT: Okay. All right. I pulled you off of  
9 your argument --

10 MR. STEINBERG: But I think, Your Honor, that that's  
11 significant. Your Honor has heard the date of September 1 for  
12 discovery. The phase three discovery is primarily New GM's  
13 discovery of the plaintiffs. The discovery about what was  
14 being done for the defendants took place much earlier than  
15 that. The judge wanted to approach the discovery of New GM  
16 before the discovery of the plaintiffs. So --

17 THE COURT: Since I pulled you out of the order of  
18 your argument, --

19 MR. STEINBERG: Okay.

20 THE COURT: -- there seemed to be a disagreement  
21 between Mr. Weisfelner and Mr. Peller about whether Judge  
22 Furman is going to decide whether there was a due process  
23 violation with respect to non-ignition switch plaintiff  
24 recalls. What's your view?

25 MR. STEINBERG: I think Mr. Peller is correct, and I



1 think when Mr. Weintraub stood for his brief second, he  
2 actually agreed with Mr. Peller. Judge Furman --

3 THE COURT: He's saying that you agreed with Mr.  
4 Peller. He's putting his hands by his ears. He didn't hear  
5 you.

6 MR. STEINBERG: Yeah. I think Mr. Peller's correct,  
7 that Judge Furman has never identified that I'm going to decide  
8 the due process issue. Frankly, it's always been our view that  
9 the due process issue for non-ignition switch economic loss  
10 plaintiffs were decided in connection with December 2015  
11 judgment --

12 THE COURT: I know that's your view.

13 MR. STEINBERG: Right. So -- and that's the Footnote  
14 70 of the decision, and the fact that the sack became the tack  
15 (phonetic), and they took out non-ignition switch plaintiffs.

16 There was a reference to the discovery that is in the  
17 MDL, and there it is not a needle in the haystack. The  
18 discovery that's done, if you look at it from the ignition  
19 switch side, is whether there was a defect and when Old GM knew  
20 about it. I think to that extent Mr. Weisfelner was right,  
21 that that's the same kind of discovery that you would have for  
22 a due process violation.

23 That type of discovery for non-ignition switch  
24 plaintiffs was actually extant. I think I said millions of  
25 documents? Hundreds of thousands of documents is more accurate



1 with regard to non-ignition switch plaintiffs.

2 And Judge Furman has only really allowed one GM  
3 employee to be deposed once. So if you're going to depose GM  
4 employee, it's going to have to be with regard to everything.  
5 There was over 100 depositions that were taken of GM employees  
6 in 2015. Very active basis -- they had the ability -- and when  
7 people talk about that Judge Gerber stayed discovery in the  
8 bankruptcy court, and the reference to the September 2014  
9 decision and Mr. Weisfelner's recollection of conversations  
10 that he had with me, this is what I believe actually happened.

11 It is very much, like I said before the break, that  
12 we wanted to see whether we could resolve the due process issue  
13 on a stipulated record. And anybody who wanted to take  
14 discovery --

15 THE COURT: As to ignition switch --

16 MR. STEINBERG: As for ignition switch plaintiffs,  
17 because they had the benefit of the extensive Valukas report.  
18 And that anybody who wanted to challenge that, Judge Gerber  
19 essentially said, "I'm going to see what's presented in front  
20 of me. And if I think you need discovery, I'll deal with it.  
21 And if not, I'm going to make a ruling." And that's what he  
22 did.

23 After that, in -- when he rendered his ruling in  
24 April, decision in June of 2015, there had been active  
25 discovery already going on in the MDL with regard to the



1 non-ignition switch plaintiffs, and had been going on for a  
2 while. And plaintiffs never would have tolerated not allowing  
3 their MDL case to go forward. And New GM wasn't stopping the  
4 discovery in connection with that case.

5           The only stay that was relevant was with regard to  
6 the adjudication of the four threshold issues, if you thought  
7 you needed discovery. And the plaintiffs, other than the  
8 Groman plaintiffs -- I don't even think it was Mr. Peller --  
9 other than the Groman plaintiffs said, "I think we could decide  
10 these issues without the benefit of discovery."

11           So there was no stopping of discovery. They had the  
12 ability to raise the issues. And that's why Judge Gerber in  
13 his June judgment said for non-ignition switch plaintiffs, "If  
14 you think you need discovery as part of your no-objection  
15 pleading, you really should tell me about it so that I could  
16 deal with it, because I want to get closure on this issue. I  
17 don't want to put this off any further."

18           THE COURT: There's a question I asked Mr. Weintraub  
19 earlier this morning. And I think it was -- I told you that  
20 I'd be thinking about this, wrote it down. Are there any facts  
21 in the record that show the relationship or nexus in the  
22 recalls covered by 14V-047 and the later recalls? The  
23 June/July -- or whether it was July/August, the summer recalls  
24 also dealt with ignition switch problems, correct?

25           MR. STEINBERG: Different cars, different platform --



1 THE COURT: Yes. But that raised -- the closeness --  
2 the relative closeness in time of the first set of recalls and  
3 the second set of recalls raised a question in my mind about  
4 did Old GM know the facts about alleged defects that gave rise  
5 to that second round of recalls. And the reason I'm -- I'm  
6 having trouble piecing this together in my own mind, what makes  
7 sense. All right?

8 I know that Judge Gerber deferred non-ignition switch  
9 issues in April and June. I've said it's unclear to me whether  
10 or how he dealt with it in November and December. And if -- I  
11 would have a hard time believing that the plaintiffs would drop  
12 -- the non-ignition switch plaintiffs would drop a due process  
13 issue if there was a second set of recalls so close in time --  
14 yes, involving different vehicles, but yes, involving ignition  
15 switch -- alleged ignition switch problems.

16 And I'm trying to reconcile in my own mind -- I said  
17 that look -- you know, part of my reaction in looking at this  
18 is Judge Gerber decided that, quote, "We'll deal with due  
19 process issues and ignition switch plaintiffs first. If I  
20 decide, yeah, there's a due process violation but not remedy,  
21 well, then there's nothing to deal with respect to non-ignition  
22 switch plaintiffs." Okay? And that's what, in my mind,  
23 Mr. Steinberg, I'm asking myself this question.

24 If that second round of recalls, yes, different  
25 vehicles, but yes, focused on ignition switch -- I'm putting



1 aside power steering and side panel and airbags and stuff. I  
2 don't know how similar were the problems that were being  
3 experienced in these additional make and model years of cars.  
4 And would it make sense if they would just not deal -- they  
5 would just not even raise the issue. We have to decide the due  
6 process issue first.

7 MR. STEINBERG: I think the answer is yes. I think  
8 it does make sense.

9 THE COURT: Does it make sense?

10 MR. STEINBERG: And the reason -- the reason why I  
11 say that is that they clearly understood from Judge Gerber's  
12 comments that he wanted it to have been raised. And he told  
13 them that if you're going to raise it, I need to have it teed  
14 up now. And they indicated if I'm going to do it, I will tee  
15 it up now.

16 And in the same way, Judge, if you're perplexed about  
17 that, you may scratch your head and say why didn't they appeal  
18 the December judgment when you had the ruling on punitive  
19 damages and you had the ruling on independent claims? Why  
20 didn't they appeal then? Well, the appeal was a single  
21 issue --

22 THE COURT: Let me ask you the second part of the  
23 question I asked Mr. Weintraub. Was there any fact-finding by  
24 NHTSA or Valukas or any other administrative body that shows  
25 defects other than the ignition switch defects were known to



1 Old GM before the 363 sale? They say yes. What's your answer?

2 MR. STEINBERG: The answer is no. No, but -- but  
3 there is an answer, right? I mean this is --

4 THE COURT: No, no. I'm not disputing.

5 MR. STEINBERG: No, no.

6 THE COURT: One of you is right and one of you is  
7 wrong.

8 MR. STEINBERG: That's correct.

9 THE COURT: That's what's called a factual --

10 MR. STEINBERG: I agree. The Valukas report was  
11 rendered in May. It dealt with only the February and March  
12 recalls. I don't think there's any --

13 THE COURT: What about NHTSA, when they issue --

14 MR. STEINBERG: When NHTSA fined GM, it was only  
15 for --

16 THE COURT: No, when the additional round of recalls  
17 got issued, was there any -- is there any finding --

18 Come on, Mr. Weisfelner. Can you --

19 MR. WEISFELNER: I'm sorry.

20 THE COURT: Was there any finding of any relationship  
21 or connection? Was there a reference back to the earlier  
22 recalls?

23 MR. STEINBERG: I don't -- I don't think so, Your  
24 Honor. I think GM recalled the vehicles and NHTSA fined New GM  
25 for only the ignition switch recalls and the certified





1 pre-owned issue and said that you were aware that as of March  
2 of -- the spring of 2012. So if --

3 THE COURT: Not for the second round of --

4 MR. STEINBERG: Well, those fines were limited to  
5 ignition switch -- what I've been calling the ignition switch  
6 recall anyway. And everything else that developed was GM --  
7 New GM announcing recalls and going to NHTSA and saying I'm  
8 recalling these vehicles. And there was nothing that tied with  
9 the -- other than the notice that goes out to the vehicle  
10 owner. And the language may have said it's an ignition switch,  
11 but every car has an ignition switch. They sometimes have a  
12 different platform, different wiring, different structure of  
13 it, and not every GM brand vehicle has the same ignition  
14 switch.

15 And so it's been a clear position that GM has  
16 asserted in the MDL that the ignition switch recall, the --  
17 what I think Mr. Weisfelner has recognized is less than two  
18 million vehicles on the road, is only the ignition switch that  
19 the Valukas report was talking about, and only the claim that  
20 NHTSA had fined GM about.

21 THE COURT: I diverted you from your --

22 MR. STEINBERG: The --

23 THE COURT: Tell me about used cars.

24 MR. STEINBERG: I'm sorry?

25 THE COURT: Tell me about the used car purchases.



1 MR. STEINBERG: Okay. I think that -- I found it  
2 interesting, and Mr. Peller did say that he has, you know, 12  
3 plaintiffs, right? So he has a very small handful of what we  
4 have involved here. It doesn't mean that his rights shouldn't  
5 be respected. I just wanted to put it in perspective as  
6 compared to others.

7 I think he either has one or two used car purchasers.  
8 One of them, the Sesay plaintiff, actually bought a car from a  
9 friend. I mean, wasn't a GM involvement in the transaction at  
10 all.

11 THE COURT: I'm sure they weren't.

12 MR. STEINBERG: I'm sorry?

13 THE COURT: I'm sure GM wasn't involved. I mean, if  
14 it was not sold off of a GM --

15 MR. STEINBERG: Right. But that's the example that  
16 we think illustrates the issue that people are trying to  
17 extrapolate from the Second Circuit decision. The Second  
18 Circuit said that used car purchasers, defined as ignition  
19 switch plaintiffs, right? The Second Circuit opinion doesn't  
20 say all used car purchasers. It actually has a defined term.

21 So used car purchasers are a subset of the economic  
22 loss ignition switch plaintiffs. And there it said that those  
23 plaintiffs can't be bound by a sale order, but did not rule on  
24 the issue as to what rights they otherwise had.

25 Those are the type of decisions that Judge Bernstein



1 made in the Burton case, which said that the only rights you  
2 have is what you acquired from. If you want to assert GM --  
3 obligations against GM. Obviously if GM entered into a  
4 certified pre-owned relationship with a used car purchaser,  
5 New GM is independently liable for that, has never tried to  
6 shirk that responsibility, and that is a form of an independent  
7 claim --

8 THE COURT: You think that Burton is the case that  
9 provides strong support that used car purchasers have no  
10 greater rights than the seller?

11 MR. STEINBERG: That's correct. And Judge Bernstein  
12 made that determination. And so you have that example. We  
13 gave in our papers the Carew (phonetic) plaintiff example.  
14 That's a Takata person. There's a lot of used car purchasers.  
15 They're seeking to assert an economic loss claim based on the  
16 Takata airbag, which was primarily installed by Old GM, into an  
17 Old GM vehicle.

18 The fact that the cars may have sold after the sale,  
19 it doesn't create new claims against New GM, where the original  
20 purchaser didn't have a claim, they took subject to whatever  
21 obligations New GM had under the sale order. And in the Carew  
22 case, they specifically allege Old GM conduct and an implied  
23 warranty claim a the basis to say why New GM is liable, when  
24 those claims are clearly barred by the sale order, no matter  
25 who owns the car.



1 And so we think that Burton recognizes that issue,  
2 and we think that the bankruptcy court retained jurisdiction to  
3 enforce the sale order to protect New GM for that. Other than  
4 that, I don't think we were quarreling with the Second Circuit  
5 decision. We just think that the Second Circuit didn't deal  
6 with the issue that Judge Gerber did in his opinion where he  
7 talked about that a plaintiff only -- that a used car purchaser  
8 only gets whatever rights that its seller had. And if a seller  
9 was bound by the sale order, so is the purchaser.

10 Now Your Honor had asked the question about accident  
11 cases, right? And I don't know why there was any confusion.  
12 If you look at the tautology we've set up, we've assumed  
13 product liability claims for accident cases no matter who was  
14 the owner of the vehicle at the time of the accident, whether  
15 it's the original purchaser or the used car purchaser, New GM  
16 is liable. So we weren't looking to change that result.

17 THE COURT: Do you agree with Judge Bernstein's  
18 decision in Grumman Olson?

19 MR. STEINBERG: Yes.

20 THE COURT: You believe that that correctly decides  
21 the issues --

22 MR. STEINBERG: I do.

23 THE COURT: -- that Judge Bernstein addressed.

24 MR. STEINBERG: I do. But Judge Bernstein,  
25 Grumman Olson specifically excepted out the GM case.



1 THE COURT: I'm asking whether you -- he articulated  
2 principles, which I don't think are particularly controversial,  
3 frankly, regarding future claims; that they can't be  
4 identified, you can't give them notice, they didn't get notice,  
5 they're not bound by a sale order. You agree that that applies  
6 here too?

7 MR. STEINBERG: Right, but in Grumman Olson you need  
8 to focus in on who the plaintiff was in that case, who was not  
9 the actual vehicle owner at the time of the sale --

10 THE COURT: There should be a case that says  
11 ownership of the vehicle determines whether the driver in an  
12 accident because of the defect in the vehicle can or cannot  
13 assert a claim.

14 MR. STEINBERG: The Second Circuit decision in  
15 General Motors, one of the few things that was I thought  
16 helpful, was the court said, does the bankruptcy court have  
17 jurisdiction to enforce its no successor liability for a latent  
18 defect fix? Not an accident case, but a latent defect. The  
19 person didn't know they had a problem, but years after the sale  
20 it had developed a problem. And the Second Circuit said the  
21 answer was yes, you could bind those people with a latent  
22 defect case --

23 THE COURT: If I have the misfortune --

24 MR. STEINBERG: -- because they have the relationship  
25 -- because the definition of claim required a relationship



1 between the debtor and the person who you're trying to bind.  
2 Anybody who was an owner of a vehicle at a time, whether they  
3 got into an accident afterwards or a latent defect  
4 afterwards --

5 THE COURT: So you think that the passenger, who  
6 happens to be in a vehicle owned by me, if I get into an  
7 accident and I have a GM vehicle manufactured by Old GM, that  
8 the passenger can bring a claim against New GM based on alleged  
9 defect, but I can't?

10 MR. STEINBERG: I actually think you both can. I  
11 assumed your liability. You're the owner of the vehicle and  
12 I've assumed all liabilities relating to the accident. So the  
13 passenger -- but you don't -- and that's why Judge Bernstein in  
14 Grumman Olson said I don't have to deal with the due process  
15 issue because you've assumed the liability for the accident.

16 And that's why Grumman Olson, and that's what we  
17 argued before Judge Gerber. Grumman Olson doesn't apply in  
18 this case. Not -- Grumman Olson applies in a circumstance  
19 where your sale order is trying to wipe out these claims that  
20 will emerge from an accident afterwards because the purchaser  
21 hasn't assumed the liability.

22 When the purchaser assumes the liability, you finesse  
23 the Grumman Olson issue. That's why the 44 state attorney  
24 generals at the sale hearing who were pushing this issue  
25 dropped the issue and allowed the case to go forward and



1 allowed the sale order to be entered. And that's why Judge  
2 Bernstein in Grumman Olson excepts out the General Motors case.  
3 He said General Motors is not the Grumman Olson paradigm.

4           So, yeah, I think that if -- there is a difference  
5 between the passenger and the owner. Because I think you could  
6 bind the owner and you can't bind the passenger, and I don't  
7 think it matters between owner and passenger when you assume  
8 the liability for either one of them anyway.

9           And that's my answer. And that's why I think there's  
10 been a distortion of the four threshold issue, because the four  
11 threshold issue wasn't for me to litigate Grumman Olson all  
12 over again. That was determined in 2009 as it went up on  
13 appeal with regard to everybody who was there.

14           What was the four threshold issue was can I take the  
15 path for punitive damages on a successor liability theory? And  
16 the answer is that the judgment that was entered in December  
17 says you can't do it on Old GM conduct or any other theory of  
18 law which took out successor liability.

19           And when you look at the proposed orders that we both  
20 gave Judge Gerber, one of what the plaintiffs put in and  
21 recognized is that you can't assert punitive damages based on  
22 Old GM conduct. That was in their order that they were asking  
23 Judge Gerber to sign. That's -- ultimately he didn't sign  
24 exactly their order, but that is the language.

25           Mr. Peller in his brief recognizes that the December



1 judgment barred successor liability -- punitive damages based  
2 on a successor liability. It's another situation where  
3 Mr. Peller, who's been somewhat of a gadfly in this case, has  
4 actually agreed with GM in that particular circumstance.

5 THE COURT: I don't see what was said about -- in my  
6 notes I said, you know, the Second Circuit held a free and  
7 clear sale provision could not be enforced against creditors  
8 who establish a due process violation, right?

9 MR. STEINBERG: Established a due process violation,  
10 correct.

11 THE COURT: Do any provisions of a sale order apply  
12 to such creditors, other than the -- even with a due process  
13 violation? In other words, what's the provision in the sale  
14 order that bars punitive damage claims against New GM?

15 MR. STEINBERG: I think the provision in the sale  
16 order was Judge Gerber's interpretation of the sale agreement.

17 THE COURT: Okay.

18 MR. STEINBERG: So there is no express language. It  
19 is --

20 THE COURT: What's the language in the sale agreement  
21 that you believe precludes punitive damages?

22 MR. STEINBERG: I think Judge Gerber did a contract  
23 interpretation. It's reflected in the November decision.  
24 There's a few pages on that. But he basically said New GM  
25 never would have assumed punitive damages for Old GM. No





1 normal seller would have done that. Talks about the difference  
2 being punitive damages as to -- that it's not a property right.  
3 It's to punish somebody. And it's to deter behavior --

4 THE COURT: All policies behind punitive damages  
5 would appear to, in my view, disfavor imposing punitive damage  
6 on either assumed liability or successor liability. Because it  
7 is intended to punish --

8 MR. STEINBERG: That's correct.

9 THE COURT: -- the conduct of someone. And they're  
10 not around to punish.

11 MR. STEINBERG: And he was -- he was finding at the  
12 same time of approving the sale, he was saying that the  
13 purchaser was a good faith purchaser, so the -- who was  
14 essentially, for reasons beyond just the pure value of the  
15 assets, trying to save the domestic auto industry at a time of  
16 the second worst recession since the -- the worst recession  
17 since the Great Depression.

18 THE COURT: In your view does the punitive damage  
19 ruling survive the Second Circuit reversal?

20 MR. STEINBERG: Well, the punitive damages wasn't  
21 decided by the Second Circuit at all. It wasn't an issue that  
22 was before the Second Circuit.

23 THE COURT: I just want to be clear on what your  
24 argument is.

25 MR. STEINBERG: Okay. I'm not going to talk about



1 the gatekeeper role, because I think Your Honor has made his  
2 views clear --

3 THE COURT: Better or worse, I am going to be the  
4 gatekeeper.

5 MR. STEINBERG: I do want to talk a little about the  
6 individual plaintiffs. Your Honor, before I get to that,  
7 though, our --

8 THE COURT: I do want you to address any limitation  
9 on assertion of independent claims, because your position is  
10 that non-ignition switch plaintiffs can't assert independent  
11 claims. Right? That's your position?

12 MR. STEINBERG: That's correct.

13 THE COURT: And I have a lot of trouble with that.  
14 You need to address that specifically.

15 MR. STEINBERG: I think, Your Honor, it falls into  
16 two buckets. One is the res judicata argument. The December  
17 judgment, not subject to the mandate rule, the wipe-out rule or  
18 Rule 60, specifically says in paragraph 14 that non-ignition  
19 switch plaintiffs and post-closing accident non-ignition switch  
20 plaintiffs --

21 THE COURT: Can res judicata apply when the Second  
22 Circuit has reversed, and specifically as to non-ignition  
23 switch plaintiffs remanded to this Court to decide issues with  
24 respect to the non-ignition switch --

25 MR. STEINBERG: I actually think the second -- this



1 was the ruling that the Second Circuit was asking for. They  
2 were saying I want to see whether there's a due process  
3 violation that was rendered or not with respect to non-ignition  
4 switch --

5 THE COURT: Does it limit -- I didn't see where it  
6 limited the remand. I mean, this in some ways comes back to my  
7 concerns about whether non-ignition switch issues were  
8 deferred. And to the extent that they were decided, the Second  
9 Circuit reverses and remands.

10 Because I'll tell you, Mr. Steinberg, you may be -- I  
11 am going to go back and look carefully at the res judicata  
12 argument, but if Judge Gerber decided that non-ignition switch  
13 plaintiffs can't bring truly independent claims, I think he's  
14 wrong. I just -- I mean, I'm telling you straight out. I  
15 mean, I don't think -- I read the Supreme Court's Bailey  
16 decision. I read the Second Circuit's series of Manville  
17 decisions, as -- whether you do it in terms of I don't -- the  
18 bankruptcy court wouldn't have subject matter jurisdiction to  
19 do it -- it's I grew up believing, you know, as a lawyer that I  
20 can't release -- I can't get a release for things that haven't  
21 happened yet.

22 MR. STEINBERG: Well, I think --

23 THE COURT: And if it's truly an independent claim, I  
24 don't see how the bankruptcy court can enjoin them.

25 MR. STEINBERG: Well, I think that the argument on



1 the res judicata point is not a matter of whether if you were  
2 deciding the case whether you would have come out that way. It  
3 is a matter that Judge Gerber decided that way. And if you  
4 fail to appeal, there are consequences for not appealing.

5 THE COURT: That's why I -- did he decide that issue  
6 with respect to non-ignition switch plaintiffs?

7 MR. STEINBERG: I think it's -- I think Footnote 70  
8 is -- oh, I'm sorry. Paragraph 14 is absolutely clear. And  
9 when plaintiffs said that all he did was stay it but didn't  
10 really actually rule on that, that may be what they wish, but  
11 that was not any logical --

12 THE COURT: So, look, where the judgment is vacated,  
13 and the case is back before me, I can always change -- in a  
14 case before me, I can change my mind. I can say well, you  
15 know, I've reflected further and I think I was wrong.

16 I understand your -- I'm not wiping out your res  
17 judicata argument. I have problems with it, in part because I  
18 don't think -- if the case was before me, I don't think I could  
19 bar anybody from asserting independent claims truly based on  
20 post-sale conduct by New GM. Whether it states a claim under  
21 state law, I don't know. But I don't see how I could enjoin  
22 plaintiffs from -- any plaintiff from asserting independent  
23 claims based exclusively on conduct by New GM.

24 I agree with you completely -- that was part of my  
25 issue with Mr. Hirsch, you read the language of this complaint,



1 and it seemed to me he was trying to do through the back door  
2 what others -- many others have tried to do before, and says  
3 he's willing to amend it to take that out. I agree that nobody  
4 should be permitted from the guise of an independent claim to  
5 base it on Old GM conduct.

6 MR. STEINBERG: I think --

7 THE COURT: But things that are based on New GM  
8 conduct, I don't see how a bankruptcy judge has the authority  
9 to say you can't do it.

10 MR. STEINBERG: I think, Your Honor, where I would  
11 like to take you in the argument, just to illustrate it, is  
12 that at this point in time I am not going to argue with you as  
13 to whether this might have exceeded the bankruptcy court's  
14 subject matter jurisdiction to make its ruling to bar  
15 independent claims. For purposes of our colloquy, I will  
16 concede that issue.

17 The question then becomes if you fail to appeal when  
18 the lower court has exceeded its subject matter jurisdiction,  
19 have you failed to appeal when the lower court did not  
20 effectuate due process, but you didn't appeal it, what are the  
21 consequences of not doing it? And the Second Circuit did not  
22 change at all the December judgment. That was not before the  
23 Second Circuit. That cannot be subject to the wipeout rule.  
24 And Rules 60(b)(5) and 60(b)(6) has clear authority that we  
25 cite our briefs that say if you do not appeal, I don't care --



1 it doesn't matter anymore, because -- and Travelers v. Bailey  
2 said, you know what, finality in a case trumps everything else  
3 because we have to have cases with an end. And I think our  
4 papers actually have a more lengthy quote that says that.

5           So you're struggling with the notion as why did Judge  
6 Gerber come to this conclusion. And what I'm trying to say to  
7 you, he did, and he was clear that he did. Paragraph 14  
8 doesn't say in any way that there should be a stay. He was  
9 unequivocal. And you may say he was wrong. But the burden was  
10 on the plaintiffs to appeal and get another court to say that  
11 he was wrong. And if the plaintiffs, who appealed the order  
12 but not that ruling, if they didn't do it, then they waived it.  
13 And that's what Travelers v. Bailey said.

14           So if you ask me what my argument is on independent  
15 claims, that is one of my arguments. I do have other  
16 arguments, but that is one.

17           THE COURT: Would you agree that a state court  
18 plaintiff in -- you pick a state -- who did not appear here,  
19 they could assert independent claims against New GM?

20           MR. STEINBERG: I think a state court plaintiff who  
21 wasn't served with the scheduling order and started their  
22 lawsuit in 2016, if they want to assert an independent claim,  
23 then I don't necessarily have the same res judicata argument  
24 or --

25           THE COURT: What's the language in the scheduling



1 order that said that the issue of independent claims by  
2 non-ignition switch plaintiffs was going to be decided by the  
3 Court?

4 MR. STEINBERG: I don't think there is language in  
5 the scheduling order --

6 THE COURT: So how are people in Hinterland supposed  
7 to know that the Court was going to decide whether non-ignition  
8 switch plaintiffs could assert independent claims against New  
9 GM based solely on New GM --

10 MR. STEINBERG: I think the simplest answer is they  
11 get the order and then they see that it happens. And therefore  
12 they either appeal or move to reargue and say that my rights  
13 are being impacted --

14 THE COURT: I have a really hard time saying that  
15 silence in a scheduling order binds anybody who gets it to a  
16 decision on an issue that wasn't specifically identified in the  
17 order.

18 If I enter an order -- I'm not perfect, but I try to  
19 specifically identify the issues that are before me. If I  
20 enter a pretrial order, it's got to identify specifically the  
21 issues that are going to be tried. I don't want any confusion  
22 about it.

23 MR. STEINBERG: The entire marked pleading process --  
24 the entire marked pleading process was dedicated as to whether  
25 something was a retained liability, an assumed liability or an



1 independent claim, depending on the complaint.

2 THE COURT: Okay. Go ahead. You said that --

3 MR. STEINBERG: So -- so --

4 THE COURT: -- the first prong of your argument is  
5 res judicata.

6 MR. STEINBERG: Right.

7 THE COURT: What's next?

8 MR. STEINBERG: And the second is a different  
9 variation of res judicata, which is that we believe that Judge  
10 Gerber actually determined on the complaints and the types of  
11 causes of action, including, you know, duty to recall, which we  
12 talked before. He made determinations about that, and that is  
13 also another failure to appeal res judicata. And that doesn't  
14 have any of the constitutional due process violation. It is a  
15 granular exercise to look at the claims and see whether they  
16 are --

17 THE COURT: But they only apply to the specific  
18 complaints, that he said, no, this doesn't work in this  
19 complaint.

20 MR. STEINBERG: It would apply to not just the  
21 specific claims, but any other complaint that had a similar  
22 claim, duty to recall claim, an independent duty to warn claim,  
23 or anything like that. It would apply equally across the  
24 board. And that's the purpose of the judge's Footnote 2, which  
25 is that we're going to apply this across the board.





1           Because he wasn't asking me to mark up 200  
2 complaints, including the thousand-page MDL complaint, in a  
3 two-week period of time. He recognized that I can bring  
4 representative cases that would embody the types of claims that  
5 are symbolic of these post-closing accident plaintiffs, and  
6 they would bind. And I served my other claims letter on  
7 everybody. I mean -- and my complaint on the MDL complaint,  
8 and the bellwether complaint, that was served on everybody and  
9 it was also on the ECF system. So --

10           THE COURT: You're putting --

11           MR. STEINBERG: And certainly, Your Honor, as we  
12 think about this, --

13           THE COURT: As paragraph 14 of the December judgment  
14 that you're resting on for wiping out independent claims?

15           MR. STEINBERG: Right. Especially the last sentence  
16 of paragraph 14. We do have a greater explanation, and I'll  
17 read. It says that:

18           "To the extent the plaintiffs have attempted to  
19 assert an independent claim in a pre-existing lawsuit  
20 with respect to an Old GM vehicle, those claims are  
21 proscribed by the sale order, April decision, and  
22 June judgment."

23           So he actually ruled on that basis, and I believe  
24 that's the granularity basis. You can dismiss why we killed  
25 ourselves doing the marked pleading, but Judge Gerber actually



1 went through the marked pleading process. He went through the  
2 -- you know, we had five different color-coded. We had duty to  
3 warn as one color. Footnote, I think it's 9, of the November  
4 decision has the listing of the different color coding on the  
5 various complaints.

6 He looked at it. We tried to deal with this in a  
7 practical way so he could give good guidance. And he was  
8 prepared to let Judge Furman decide issues in the MDL; but on  
9 the other courts and the other system, he was giving more firm,  
10 precise rulings.

11 And one could say -- and scratch your head saying  
12 what was Judge Gerber thinking? Right? You know, if I try to  
13 tell you this is what Judge Gerber is thinking, you'd say,  
14 "Well, how do you know? You're not inside of his head."  
15 Plaintiffs tried to do it before. It's the same response. The  
16 reality is, is that there's an order. The order reflects at  
17 the end of the day what he was thinking. And the order is  
18 unequivocal. The order said this is what it is.

19 The third thing, Your Honor, and this is what I would  
20 say is that -- if Your Honor believed that the res judicata  
21 argument doesn't work, then you could see from your history in  
22 this case since Judge Gerber retired that plaintiffs are very  
23 creative in trying to dance around the proscriptions of the  
24 sale order and other rulings in order to try to assert  
25 something as an independent claim.



1           One of the arguments that I had in connection with  
2 Pitterman was that a duty to warn as an independent claim, when  
3 I didn't have any relationship or contact with the plaintiff,  
4 assumed that -- I mean, where is that based on? It wasn't the  
5 manufacturer or seller of the car. It wasn't based on a  
6 federal statute. Where do you get that from? Merely because  
7 you put it in your words, want to sue in a state court, find a  
8 friendly home forum, and now I have 42 different judges  
9 weighing on the same type of claim?

10           Judge Gerber recognizes that part of the gatekeeping  
11 function -- and Judge Bernstein recognized when he did the  
12 Old Carco case, he said I'm getting rid of this duty to recall  
13 claim as a global basis based on his interpretation of the sale  
14 order. And I think that's what needs to happen here. I  
15 I'm afraid, Judge, if I don't tackle --

16           THE COURT: I'll stop you. Go ahead.

17           MR. STEINBERG: No, no, no. I just think I need to  
18 -- for fairness here, although we do have the Tronox opinion, I  
19 assume you want to accomplish -- you want to be able to finish  
20 this. So let me try to deal with the individual plaintiffs.  
21 Let me start with Pillars. I think the June judgment and the  
22 December judgment has defined terms. The brief to the Second  
23 Circuit had defined terms. They were all consistent, and the  
24 need for consistency, so people understand what you're talking  
25 about. Ignition switch plaintiff is --



1 THE COURT: So what is Mr. Babcock -- he's telling me  
2 that New GM, in its multiple pleadings, conceded that he had an  
3 ignition switch defect and that you're bound by it.

4 MR. STEINBERG: Right. So he's wrong.

5 THE COURT: And you're going to tell me why he's  
6 wrong.

7 MR. STEINBERG: I am. One, the easiest and clearest  
8 way is that if you look at the June 2015 judgment, and you look  
9 at Exhibit D which is --

10 THE COURT: Exhibit B as in boy?

11 MR. STEINBERG: Exhibit D as in dog. Exhibit D where  
12 we list in our June judgment who are the non-ignition switch  
13 plaintiffs and the non-ignition switch pre-closing accident  
14 plaintiffs, the Pillars case is listed there. So we presented  
15 to the judge the list of who we considered to be the non-  
16 ignition switch plaintiffs.

17 The second thing is when Judge Gerber ruled that  
18 ignition switch pre-closing accident plaintiffs were barred by  
19 the sale order, we wrote to the non-ignition switch pre-closing  
20 accident plaintiffs and said that you are essentially in the  
21 same position as the ignition switch pre-closing accident  
22 plaintiffs. The sale order wiped out all pre-closing accident  
23 plaintiffs, and Judge Gerber just said he didn't have enough  
24 information for non-ignition switch plaintiffs' economic loss,  
25 but he also carved out pre-sale accident non-ignition switch



1 plaintiffs.

2           So when we said to people in a letter that you are in  
3 an identical position, we weren't saying you were those people.  
4 We were saying you were in the same position as an ignition  
5 switch plaintiff if you were a pre-closing accident plaintiff,  
6 and all pre-closing accident plaintiffs are barred. And that  
7 same pleading that he's referring to also references  
8 paragraph 36 of the December judgment which references the fact  
9 that all pre-closing accident plaintiffs are barred by the sale  
10 order.

11           We were consistent in our pleading before Judge  
12 Furman that what Pillars --

13           THE COURT: Keep -- the are wires under the desk that  
14 can catch you.

15           MR. STEINBERG: We were consistent with Judge Furman,  
16 but Pillars is someone who did not have a subject vehicle,  
17 which by definition means he's not an ignition switch party.  
18 And we were consistent throughout, so that is the reason why  
19 Pillars is wrong. If you look at the context of what he  
20 quoted, it was saying that they were in an identical position,  
21 but that doesn't mean that you are that party. You're actually  
22 making an analogy, saying you're out for the same reason. And  
23 then if you need something concrete, it's the June 2015  
24 judgment.

25           With regard to Pilgrim, I think the plaintiff



1 basically touched based and, you know, set forth the right  
2 things. They started a complaint on October 14, but they --  
3 that complaint is a very lengthy complaint and is substantially  
4 identical to what you would see in the MDL complaint. So they  
5 knew, I believe -- and if I had to take discovery on it, I  
6 would be able to take discovery on it. They knew about the  
7 proceedings in the bankruptcy court, but as soon as they sued  
8 us, we gave them a demand letter on October 28. We gave them a  
9 copy of the December judgment before the appeal period had  
10 expired, and they failed to appeal or move for reconsideration,  
11 and we believe that they should be bound.

12           The February 2016 stipulation that we entered in the  
13 bankruptcy court said that the Second Circuit may have an  
14 impact on this case, and therefore we were going to maintain  
15 the status quo. But that has nothing to do with the vitality  
16 of the December judgment, and we believe they are bound. They  
17 are not a recall case. Their vehicles were not subject to the  
18 February and March 2015 recalls. They are non-ignition switch  
19 economic loss cases. They have asserted a duty to recall in  
20 their complaint. The duty to recall is not an assumed  
21 liability for the discussion that I had in Pitterman, which is  
22 the paragraph --

23           THE COURT: So you're -- okay.

24           MR. STEINBERG: Yeah.

25           THE COURT: That's a factual issue.



1 MR. STEINBERG: And essentially when you read their  
2 complaint, they're asserting a design defect, and New GM did  
3 not assume a design defect liability in connection with an Old  
4 GM vehicle, no matter on an economic loss basis, no matter how  
5 you contort or change the words. So on Pilgrim, we believe  
6 that the answer is is they knew what was going on. They can't  
7 lie in wait and just say --

8 THE COURT: You say they knew what was going on.  
9 Mr. Scott told me Pilgrim had no representation in the  
10 bankruptcy court until recently.

11 MR. STEINBERG: They filed a --

12 THE COURT: Do you agree or disagree?

13 MR. STEINBERG: They --

14 THE COURT: Were they served with the September  
15 (indiscernible)?

16 MR. STEINBERG: No, because they didn't bring  
17 their --

18 THE COURT: That's right. You told me --

19 MR. STEINBERG: They didn't bring their lawsuit until  
20 October 14.

21 THE COURT: So how can they be bound? They -- you --  
22 I take it then you agree they were not represented in this  
23 court during those prior proceedings.

24 MR. STEINBERG: They would -- they became aware of  
25 the proceedings before the judge ruled on the matter.



1 THE COURT: So you know what I ruled in the lien  
2 release case, when I denied the motion to dismiss by everybody  
3 who said that they -- you know, they're -- they weren't served.  
4 You cite that -- you cite my decision in that case.

5 MR. STEINBERG: Yeah. And I would say to Your Honor,  
6 think about a circumstance where someone wants to sue New GM,  
7 knows that these proceedings are going on, and figures that if  
8 New GM loses, I could then just sue because I can get  
9 affirmative collateral estoppel. And if New GM wins, I can say  
10 that I lied in the weeds and I'm not bound by it because I  
11 wasn't made a party to the proceeding on an event that took  
12 place eight years, seven years before.

13 I mean, they're talking about cars that were  
14 purchased in 2006. They talked about, you know, bulletins that  
15 were entered. These people spent months I think before they  
16 actually filed their complaint. They knew what was going on in  
17 the bankruptcy because they basically cribbed their complaint.  
18 This is me testifying now, but I'm saying to you that for this  
19 type of case, when someone emerged during the process, even  
20 though they didn't get the scheduling order --

21 THE COURT: Res judicata doesn't apply.

22 MR. STEINBERG: Res judicata does not apply, but the  
23 question is whether they should be bound otherwise.

24 THE COURT: A good theory. It may be that a prior  
25 decision by Judge Gerber that is not -- that remains the





1 operative ruling is the persuasive authority that would bind --  
2 that would be applied and would result in dismissing their  
3 claim or enjoining their claim. But it's not res judicata, so  
4 what -- tell me the precise legal theory on which you say they  
5 are precluded now.

6 MR. STEINBERG: Your Honor, there was a sale order  
7 that was entered, a sale motion that was entered, and someone  
8 didn't get notice, written notice of the sale motion but were  
9 otherwise aware of the sale motion and that their rights were  
10 otherwise going to be impacted. Is that party who didn't get  
11 that written notice but was otherwise aware of the proceedings  
12 going to be bound by the rulings by the Court?

13 THE COURT: Can you point me to a case that supports  
14 you --

15 MR. STEINBERG: I cannot do it right now, but I'd  
16 like to have the opportunity to submit something before the end  
17 of the week.

18 THE COURT: Okay.

19 MR. STEINBERG: Okay. That's -- that is the  
20 argument, and that would be the argument that I would  
21 establish, if I can establish the facts that I've been talking  
22 about.

23 THE COURT: Okay. All right.

24 MR. STEINBERG: On Mr. Peller, I will note that on  
25 page 3 of his pleadings, he talks about an independent claim



1 asserted by Bledsoe, and that's relate -- Bledsoe is a pre-  
2 petition accident case, so I don't know how he would get to an  
3 independent claim notion. But that's an -- that's really,  
4 without trying to get to the roots of Bledsoe, that's an  
5 indication of why the gatekeeper function needs to be dealt  
6 with.

7 Paragraph 28 of the December judgment does not lead  
8 the way Mr. Peller said it leads. It says:

9 "With respect to the Peller complaints, the ignition  
10 switch plaintiffs may assert claims based on alleged  
11 duties of New GM relating to post-sale events  
12 relating to Old GM vehicles to the extent that they  
13 are actionable as matters of non-bankruptcy law to be  
14 decided by non-bankruptcy courts. Provided, however,  
15 the Peller complaint shall remain stayed unless and  
16 until they are amended."

17 And then there were three Romanettes. The third  
18 Romanette is to strike any purported independent claims by non-  
19 ignition switch plaintiffs.

20 THE COURT: Let's come back to the same issue. What  
21 -- but he prevails in the Second Circuit, right?

22 MR. STEINBERG: He prevails in the Second Circuit  
23 about that, as a theoretical matter, independent claims can't  
24 be asserted. He does not prevail in the context of a marked  
25 pleading analysis where Judge Gerber reviews the Peller



1 complaints and says that these complaints aren't independent  
2 claims, and he doesn't prevail to the extent that res judicata  
3 would apply and say his failure to appeal here is going to be  
4 binding on him.

5 And where I think Your Honor is struggling is that  
6 you're essentially saying that the --

7 THE COURT: Mr. Weisfelner.

8 MR. WEISFELNER: Yeah, I apologize.

9 THE COURT: Go ahead, Mr. Steinberg.

10 MR. STEINBERG: Where Your Honor is struggling is  
11 that you're basically saying that the Second Circuit either on  
12 a mandate basis, a wipeout basis, or a Rule 60 basis changes  
13 the December judgment. And the answer we believe, and we -- I  
14 think we briefed this, it says that that is not the case.

15 I think the Second Circuit actually affirmed the  
16 ruling on independent claims. And what was the independent  
17 claims ruling by the lower court? It was that ignition switch  
18 plaintiffs can bring an independent claim.

19 Now, Mr. Peller says, well, that obviously was a  
20 mistake. They didn't really mean to do that if you read the  
21 decision. But they did do it, and the Second Circuit needs to  
22 -- if you want to take the literal language, that's exactly  
23 what they did. And if you thought the Second Circuit made a  
24 mistake, you were incumbent on making a motion, like we tried  
25 to make on a number -- we thought the Second Circuit made a lot



1 of mistakes. We made motions for rehearing. We petitioned for  
2 cert. We were ultimately lost either way, but they had the  
3 same burden.

4 THE COURT: What do you believe the Second Circuit  
5 decided with respect to independent claims?

6 MR. STEINBERG: I think the Second Circuit decided  
7 that, as a matter of subject matter jurisdiction, non-ignition  
8 switch plaintiffs, defined only as the Pillar plaintiffs  
9 because they were the only one there, and that they could  
10 assert that -- that they can assert an independent claim.

11 THE COURT: And so if your position is that -- and I  
12 didn't go back to look at what Judge Gerber did with respect to  
13 the strikeout from the specific complaint. Let's assume I  
14 agree with you that Mr. Peller's complaint is improper  
15 allegations in the independent claim. Doesn't he get to amend  
16 it to take the language out, proceed with independent claims?

17 MR. STEINBERG: Well, I think that if you look at  
18 Mr. Peller's complaints, they aren't language issues. He  
19 asserts things like -- he asserts causes of action that I think  
20 are clearly retained liability. I think --

21 THE COURT: Let's just -- we're just focusing on  
22 independent claims.

23 MR. STEINBERG: No, I'm say -- look, I can label  
24 anything as an independent claim. That's what the Second  
25 Circuit said in the Madoff (indiscernible) type case, and



1 that's what the Second Circuit said in the case that I'm not  
2 supposed to talk about, but basically said that you could label  
3 anything, but we're not accepting form over substance, and  
4 we're expecting people to look through what was written to see  
5 whether it was enjoined or not enjoined.

6 And in this particular case, that's what Judge Gerber  
7 was doing, and that is I think what Your Honor's job is as part  
8 of the gatekeeping function, which is, you know, they could put  
9 whatever words they want and say this now constitutes an  
10 independent claim, but if it's not, if it's --

11 THE COURT: Well, after the Second Circuit ruling, I  
12 don't see why Mr. Peller is batter out. It may be that what  
13 he's pled so far doesn't cut it, but does that mean after the  
14 Second Circuit reversed, that he can't assert truly independent  
15 claims if he pleads it properly?

16 MR. STEINBERG: Well, I think to the extent -- well,  
17 to some extent, his complaints are in the MDL and they're not  
18 really being dealt with. But if your answer is whether he can  
19 actually assert something, I think we'd have to see what he  
20 asserts.

21 THE COURT: Other issues you want to address in the  
22 last five minutes?

23 MR. STEINBERG: Your Honor, I don't think the Pope  
24 plaintiffs are here. I'll rest on our papers on the Pope  
25 plaintiffs.



1 I think that Your Honor had asked about the punitive  
2 damage -- Your Honor had asked about the punitive damage  
3 ruling, was there anything that -- in the November decision  
4 that talked about subordination of claims and stuff like that.  
5 And there is, although not precisely the way I would have  
6 written it, there is some language I think on page 10 of the  
7 November decision.

8 THE COURT: Rule 726(a)(4) talks about allowed  
9 claims, including for punitive or exemplary damages. That  
10 suggest that the claims can be allowed. It's a fourth priority  
11 distribution. You agree with that?

12 MR. STEINBERG: I do. I also think that when this  
13 sale took place, everybody knew that that priority position was  
14 not going to be paid. I mean, there was a clear ruling that  
15 the shareholders were wiped out and I think there was a clear  
16 ruling -- I think there would be a clear ruling that the  
17 punitive damage claims were wiped out. I think Judge Gerber  
18 rendered a decision in what is the Apartheid case where he  
19 talked about advising under the General Motors case where he  
20 talked about punitive damages and subordinations.

21 THE COURT: Tell me what the authorities are that  
22 that limitation on punitive or exemplary damages applies to  
23 either assumed liabilities or successor liability.

24 MR. STEINBERG: Well, Judge Gerber ruled that on  
25 assumed liabilities that you couldn't get punitive damages, and



1 he did it as a matter of contract --

2 THE COURT: Yes, okay.

3 MR. STEINBERG: -- protection.

4 THE COURT: And now with respect to successor  
5 liability, is there any --

6 MR. STEINBERG: On successor --

7 THE COURT: -- is there any authority, case  
8 authority, that would say that if the debtor couldn't be liable  
9 for punitive damages, the successor can?

10 MR. STEINBERG: There's general authority and it says  
11 successor liability is derivative through what the seller had,  
12 so if the seller was not liable, the purchaser is not going to  
13 be liable on the successor liability theory. So there's that  
14 -- there's the general rule.

15 I think at the last hearing I also mentioned that we  
16 bought not from Old GM debtor, we actually bought from the  
17 debtor-in-possession. I don't even think the debtor-in-  
18 possession is responsible for the punitive damages of the  
19 predecessor. It's two steps removed. But our argument is  
20 strictly that this is a derivative claim and derivative claims  
21 means you're only liable to the extent that the seller -- and  
22 when this sale took place, they sold essentially everything of  
23 value. That's what the government took. They knew that the  
24 value of that was going to be roughly translated to somewhere  
25 between 25 to 35 cents on the dollar, depending on where the



1 claims in. They knew that no one was going to --

2 THE COURT: Well, you don't pay, then, the devalued  
3 currency of the debtor.

4 MR. STEINBERG: That's correct. You don't pay. But  
5 Judge Gerber actually talked -- in the decision he said,  
6 "Punitive damage punished past conduct and deter future  
7 wrongdoing" -- I'm leaving out the parentheticals -- "and  
8 posing punitives for Old GM conduct would not be consistent  
9 with punitive damages purposes. Claims for punitive damage, if  
10 asserted against Old GM, would have at least been subordinated,  
11 if now disallowed, as they would only penalize innocent  
12 creditors, and in any event, out of the money, given Old GM's  
13 deep insolvency" --

14 THE COURT: I have that (indiscernible).

15 MR. STEINBERG: Okay. So I think, Your Honor, I am  
16 -- whether I've finished or not, I am finished by the 5:30. I  
17 thank you for the time that you've given us.

18 I will say as a sort of a housekeeping detail, and  
19 not necessarily asking for a specific answer, but we are  
20 probably fully submitted on the threshold late claims issue,  
21 but there's been no oral argument that Your Honor has  
22 scheduled.

23 THE COURT: Discovery is done?

24 MR. STEINBERG: Well, the discovery that you  
25 authorized has been done.





1 THE COURT: Okay.

2 MR. STEINBERG: So I know you've been very busy  
3 lately and you have a lot of things on your plate. I just call  
4 to your attention that I think that's --

5 THE COURT: I wasn't aware there was all -- that it  
6 was -- is it briefed and everything?

7 MR. STEINBERG: It has been briefed. The discovery  
8 that you authorized were only -- was only interrogatories.  
9 They had 60 days to respond and I think, if they haven't done  
10 every one, they've done substantially every one, so I think  
11 that discovery is done.

12 THE COURT: Okay. Is all of the letter briefing done  
13 on Tronox?

14 MR. STEINBERG: I think the -- all the letter  
15 briefing on Tronox has been --

16 THE COURT: -- trying to get out of his seat.

17 MR. STEINBERG: Well, I think, Your Honor, in what  
18 was negotiated between the parties as to the number of pages  
19 and the issues to be discussed, that we both agreed to submit  
20 four pages, and we submitted the four pages on a simultaneous  
21 basis.

22 THE COURT: And what is Judge Furman being asked to  
23 do with respect to the Tronox issue?

24 MR. STEINBERG: There's a pending motion for -- to  
25 dismiss a part of their complaint on -- to the extent that they



1 were asserting successor liability, so the -- what we included  
2 and we gave Your Honor was the letter that was written to Judge  
3 Furman that said that, based on the Tronox decision, that the  
4 plaintiff's successor liability falls down. And that's --

5 THE COURT: So should I wait for him to decide it?

6 MR. STEINBERG: I think certainly on the successor  
7 liability side, I think my view would be yes because I think  
8 that's teed up before Judge Furman. As far as whatever the  
9 relevance is of the independent claims, I think letters that we  
10 submitted speaks for itself, but I'm happy, if Your Honor  
11 wanted to have another hearing, which I can't believe will last  
12 as long as today's hearing, I'm prepared to speak as to what I  
13 believe the relevance of Tronox is on the independent claims  
14 issue.

15 THE COURT: Okay. Mr. Weintraub?

16 MR. WEINTRAUB: Yes, Your Honor. The agreement on  
17 the submissions was limited to the independent claims issue.  
18 There's also the successor liability issue, which relates --

19 THE COURT: -- with that.

20 MR. WEINTRAUB: -- but also relates to issues for  
21 here.

22 What I would like to do, Your Honor, is submit a  
23 short letter brief on the successor liability issue because the  
24 two letters that were submitted to the Court were a letter  
25 prepared by I think King -- was it King & Spalding or was it



1 Kirkland & Ellis?

2 UNIDENTIFIED: I think Kirkland & Ellis.

3 MR. WEINTRAUB: The co-counsel on all the pleadings  
4 with King & Spalding, and Hagens Berman submitted the successor  
5 liability to Judge Furman. Hagens Berman is not a bankruptcy  
6 firm, and I've seen that letter; I think it may be deficient in  
7 some respects with respect to how I would have analyzed that  
8 issue in a bankruptcy matter.

9 THE COURT: I know, but Judge Furman is being asked  
10 to decide the effect of Tronox and successor liability claims.  
11 I have no intention of doing anything on that until he rules.  
12 I mean, he -- it's been briefed to him. I think it would be  
13 inappropriate for me to try to jump the gun and decide the  
14 issue before -- if it's been presented to him.

15 MR. WEINTRAUB: Okay. So would it be fair to say  
16 that oral argument will not cover or will cover successor  
17 liability?

18 THE COURT: What I'm going to do, because I've told  
19 you a few times before, I will inquire of Judge Furman how he  
20 -- how we decide it ought to be dealt with, and I'll advise  
21 you. Okay? It would be inappropriate for me unilaterally to  
22 say I want to hear argument and therefore any supplemental  
23 briefing on the effect of Tronox on successor liability claims.  
24 It's been put before Judge Furman, and while he and I don't  
25 discuss the merits of the issues, from time to time we do have



1 discussions about procedural posture, what hearings are coming  
2 up, et cetera. So I will inquire of Judge Furman about that  
3 and let you know.

4 MR. WEINTRAUB: Thank you, Your Honor. It would  
5 probably turn this from --

6 THE COURT: But that's not getting you off the hook  
7 about the effect of Tronox on independent claims.

8 MR. WEINTRAUB: I understand. My point is I think it  
9 would be a much longer hearing if we were to talk about  
10 successor liability as well.

11 THE COURT: Sure.

12 MR. WEINTRAUB: If I could make one other point, Your  
13 Honor, just -- there was a colloquy during argument where I  
14 think you attributed a comment that was made by Mr. Weisfelner  
15 to me and just so --

16 THE COURT: I apologize for the mistake.

17 MR. WEINTRAUB: Okay. I just -- so the record is  
18 clear, with respect to the discovery in the MDL and what it  
19 covered and whether or not there facts developed, either by  
20 NHTSA or otherwise --

21 THE COURT: -- saying that I thought it was you  
22 but --

23 MR. WEINTRAUB: It was him. Thank you, Your Honor.

24 MR. WEISFELNER: Your Honor, just briefly, I know  
25 that you have a 5:30 cutoff. On behalf of I think -- I know



1 myself, I think Mr. Peller, and maybe even Mr. Weintraub, we  
2 would request an opportunity collectively to submit no more  
3 than five pages just on issues that Mr. Steinberg raised for  
4 the very first time in his argument today, as opposed to what  
5 he covered for the first time at the last hearing.

6 And in particular, the focus would be on his, in our  
7 view, inappropriate reliance on paragraph 14 of the December  
8 decision. Mr. Steinberg selectively read half of paragraph 14,  
9 not all of it.

10 THE COURT: I promise to read the whole paragraph.

11 MR. WEISFELNER: Your Honor, you might also want to  
12 take a look at those provisions of the decision that preceded  
13 the judgment, in particular what Judge Gerber said about the  
14 Groman plaintiffs' request for discovery. And what he did say  
15 there, you'll see, if you go back to the decision itself, is  
16 that they requested discovery, the rest of the parties agreed  
17 to oppose it. It was opposed. The request for discovery was  
18 denied without prejudice pending its ability to be reasserted  
19 after the Second Circuit rules on the appeal from the prior  
20 decision.

21 THE COURT: Has a transcript been requested?

22 MR. WEISFELNER: You don't need the transcript, you  
23 just need the order. The order says just that.

24 THE COURT: All right.

25 MR. WEISFELNER: Not the order, I'm sorry, the



1 decision.

2 THE COURT: What's the -- it's in the decision.

3 MR. WEISFELNER: It's in the decision itself.

4 THE COURT: I don't want any more briefs. I don't  
5 want any more letters.

6 MR. STEINBERG: I only want to say one sentence, one  
7 sentence. The Groman plaintiffs are Ignition-Switch  
8 plaintiffs, not Non-Ignition-Switch plaintiffs.

9 THE COURT: How long -- how substantial are the  
10 materials on the late train? I'm just trying to think what I  
11 -- how much time I need to prepare.

12 MR. WEISFELNER: Your Honor, I think they're fairly  
13 substantial, but I also should tell Your Honor, in terms of  
14 your scheduling, that there are active discussions ongoing, at  
15 least between the plaintiffs, the GUC Trust, and the GUC Trust  
16 Unitholders that might or might not obviate a trial on the  
17 papers that have been submitted on this issue to date. And if  
18 we do resolve it, we may very well have to have a hearing under  
19 9019, but I think the paradigm for consideration will shift.

20 THE COURT: What's the timing?

21 MR. WEISFELNER: Your Honor, I'm hopeful that, if we  
22 are going to have a deal, it's within the next certainly 30  
23 days and maybe before that.

24 MR. STEINBERG: Your Honor, just so it's clear, I  
25 don't think the oral argument would last too long. There are



1 actually only two issues that parties briefed. One was to what  
2 extent has there been a tolling provision agreed to for each of  
3 the category of plaintiffs, so that's a defined date. And the  
4 second is whether the Pioneer factors apply in lieu of -- in  
5 view of Judge Gerber's ruling and whatever the Second Circuit  
6 said.

7           So you weren't dealing with anything with regard to  
8 the merits or the trial, but these were truly threshold issues  
9 as to whether they can file a claim without having to show the  
10 Pioneer factors and to establish when a toll came into effect.  
11 And I don't think you --

12           THE COURT: Mr. Weisfelner, file a status letter on  
13 or before 5 p.m. June -- by June 16th.

14           MR. WEISFELNER: Yes, sir.

15           THE COURT: I don't need -- obviously, I don't want  
16 to know the details if you're still negotiating, I want to know  
17 the status.

18           MR. WEISFELNER: Yes.

19           THE COURT: Okay. And after I receive that, I'll  
20 decide whether to schedule -- whether I'm going to schedule  
21 argument on the late claim issues. It will probably be  
22 sometime in July. I'm actually out of the country toward the  
23 end of June, so we'll see.

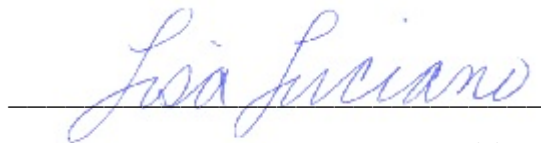
24           Thank you very much, everybody. We're adjourned.

25           (Proceedings concluded at 5:39 p.m.)



C E R T I F I C A T I O N

I, Lisa Luciano, court-approved transcriber, hereby  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.



LISA LUCIANO, AAERT NO. 327      DATE: May 19, 2017  
ACCESS TRANSCRIPTS, LLC

C E R T I F I C A T I O N

I, Ilene Watson, court-approved transcriber, hereby  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.



ILENE WATSON, AAERT NO. 447      DATE: May 19, 2017  
ACCESS TRANSCRIPTS, LLC





# Exhibit 3

**Reply Deadline: September 30, 2015**  
**Hearing Date and Time: October 14, 2015 at 9:45 a.m. (ET)**

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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

-----X  
IN RE: : Chapter 11  
: :  
MOTORS LIQUIDATION COMPANY, *et al.*, : No. 09-50026 (REG)  
f/k/a GENERAL MOTORS CORP., *et al.*, :  
: (Jointly Administered)  
Debtors. :  
-----X

**OPENING BRIEF ON IMPUTATION ISSUE ON BEHALF OF THE IGNITION  
SWITCH PLAINTIFFS, THE NON-IGNITION SWITCH PLAINTIFFS, THE STATE OF  
ARIZONA, THE PEOPLE OF THE STATE OF CALIFORNIA, THE POST-CLOSING  
IGNITION SWITCH ACCIDENT PLAINTIFFS AND THE ADAMS PLAINTIFFS**

**REDACTED VERSION**

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The Ignition Switch Plaintiffs,<sup>1</sup> certain Non-Ignition Switch Plaintiffs,<sup>2</sup> the State of Arizona *ex. rel.* Mark Brnovich, the Attorney General, the People of the State of California, by and through Orange County District Attorney Tony Rackauckas, the Post-Closing Ignition Switch Accident Plaintiffs,<sup>3</sup> and the Adams Plaintiffs<sup>4</sup> (collectively, “Plaintiffs”) hereby submit their Opening Brief on the “Imputation Issue” pursuant to the *Scheduling Order Regarding Case Management Order re: No-Strike, No Stay, Objection, and GUC Trust Asset Pleading*, dated September 3, 2015 [ECF No. 13416].

## I. INTRODUCTION

The issue before this Court is whether Plaintiffs’ Complaints violate the Sale Order’s ban on claims based on the actions of Old GM by alleging that New GM had knowledge of pre-363 Sale events (whether through imputation or otherwise). The answer is, simply, no: whenever

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<sup>1</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the *Decision on Motion to Enforce Sale Order, In re Motors Liquidation Co.*, 529 B.R. 510 (Bankr. S.D.N.Y. 2015). Except where otherwise indicated, references to “ECF No. \_” are to docket entries in the Bankruptcy Court proceedings: *In re Motors Liquidation Co.*, Bankr. Case No. 09-50026 (REF).

<sup>2</sup> The term “Non-Ignition Switch Plaintiffs” shall mean all plaintiffs that have commenced a lawsuit against New GM asserting economic losses based on or arising from an alleged defect, other than the Ignition Switch in the vehicles subject to Recall No. 14-V-047, or based on or arising from economic losses and diminution in value of their GM-branded vehicles based on the Ignition Switch Defect or other alleged defects in Old and New GM vehicles.

<sup>3</sup> As defined in the Post-Closing Ignition Switch Accident Plaintiffs’ Memorandum of Law With Respect to Punitive Damages Issue, filed on September 13, 2015 [ECF No. 13434], the Post-Closing Ignition Switch Accident Plaintiffs are the plaintiffs in the “Bellwether Cases” and certain additional plaintiffs with personal injury, wrongful death, and property damage claims arising from post-Closing Date accidents and incidents in vehicles manufactured by Old GM.

<sup>4</sup> As defined in the Adams Plaintiffs’ No Dismissal Pleading, filed on August 11, 2015 [ECF No. 13359], the Adams Plaintiffs are individuals with personal injury and wrongful death claims arising from pre-Closing Date accidents and incidents in vehicles manufactured by Old GM. Their complaint alleges a single count of liability against New GM for negligence, gross negligence, recklessness and/or fraud by concealment of the right to file a claim against Old GM in bankruptcy.

New GM's knowledge is part of the basis for a claim against New GM for its own misconduct, neither the source nor content of that knowledge can convert the claim into one based on the conduct of Old GM. As this Court recognized at the August 31 Status Conference, it has already resolved the issue.<sup>5</sup> As this Court has stated, "knowledge New GM personnel had when acting for New GM (even if those personnel acquired that knowledge while acting for Old GM) would be fair game" in litigation against New GM.<sup>6</sup> That statement is itself unassailable. So long as Plaintiffs seek to hold New GM liable solely for its own acts (and failures to act) in light of the knowledge that it had, the source of that knowledge does not change the claim into a "dressed-up" claim based on the actions of Old GM on a successorship or any other impermissible theory.

Indeed, New GM has just ***conclusively admitted*** its knowledge of the Ignition Switch Defect and its deadly consequences in a detailed Statement of Facts in a Deferred Prosecution Agreement with the United States Department of Justice ("DOJ").<sup>7</sup> As New GM has admitted for ***all*** litigation purposes,<sup>8</sup> it "failed to disclose a deadly safety defect to its U.S. regulator," and "falsely represented to consumers that vehicles containing the defect posed no safety concern."<sup>9</sup> Regardless of the source of New GM's knowledge, the Deferred Prosecution Agreement stands

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<sup>5</sup> *In re Motors Liquidation Co.*, Bankr. Case No. 09-50026 (REF), *Transcript of Notice of Hearing/Notice of Status Conference to be Held in Connection with the Court's Case Management Order*, dated August 19, 2015 [Dkt. No. 13383], and the *Letters Filed in Response Thereto (Related Document(s) 13383)* [Dkt. No. 13396] (Aug. 31, 2015) (misdated Apr. 29, 2015), at 5:23-6:2.

<sup>6</sup> *In re Motors Liquidation Co.*, 2015 Bankr. LEXIS 2406, at \*9 n.16 (Bankr. S.D.N.Y. July 22, 2015).

<sup>7</sup> A copy of the Deferred Prosecution Agreement and related documents is attached hereto as Exhibit 1.

<sup>8</sup> See Ex. A to the Deferred Prosecution Agreement at p. 6, ¶ 13.

<sup>9</sup> See Ex. C to Deferred Prosecution Agreement at ¶ 3.

as conclusive proof that New GM *itself* had knowledge of the Ignition Switch Defect and breached its clear legal obligations to disclose and remedy the defect, and to refrain from false and misleading statements to consumers.

Similar to the DOJ's claims that gave rise to the Deferred Prosecution Agreement, many of the claims Plaintiffs bring against New GM rely on New GM's knowledge of the Ignition Switch Defect (and the myriad other safety defects plaguing many models and years of GM-branded vehicles.) So, for example, Plaintiffs claim that New GM violated state consumer protection laws by, among other things, concealing and failing to disclose its knowledge of the Ignition Switch Defect and other safety defects in GM-branded vehicles in derogation of New GM's clear obligation under the Sale Agreement in which it voluntarily agreed to abide by the manufacturer's obligations under the Safety Act with respect to Old GM vehicles and parts.<sup>10</sup> The States assert that conduct by New GM subjects New GM to liability for civil penalties in connection with the sale of New GM vehicles,<sup>11</sup> and the Plaintiffs in the Second Amended Consolidated Complaint assert that the conduct subjects New GM to liability both in connection with the sale of New GM vehicles and by causing the value of *all* GM vehicles to diminish.<sup>12</sup> Plaintiffs claim that New GM can be held liable for its own actions in concealing that

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<sup>10</sup> The "Safety Act" refers to the National Traffic Vehicle and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101 *et seq.*, as amended by the Transportation Recall, Enhancement, Accountability and Documentation Act (the "TREAD Act"). In § 6.15 of the Sales Agreement, New GM agreed to abide by all Safety Act obligations with respect to vehicles and parts manufactured by Old GM.

<sup>11</sup> For the Court's convenience, the claims from the Arizona Action (¶¶ 494-511) and the California Action (¶¶ 253-273) are attached as Exhibits 2 and 3.

<sup>12</sup> By way of illustrative example, a copy Plaintiffs' claim for violations of the California Consumer Legal Remedies Act (¶¶ 1466-1492) is attached as Exhibit 4.



knowledge.<sup>13</sup> Once again, the source of that knowledge is simply irrelevant to the issues before this Court.

New GM can cite no language in the Sale Agreement or Sale Order that poses any bar to (or even mentions) charging New GM with knowledge of pre-363 Sale facts. Instead, New GM makes the circular argument that Plaintiffs cannot salvage a barred claim based on the **conduct** of Old GM by imputing **knowledge** of pre-Sale facts to New GM. New GM does not explain why basing a claim, in part, on knowledge of pre-Sale facts means that the claim is based on pre-Sale **conduct**. Again, Plaintiffs' claims are based on New GM's acts in light of New GM's knowledge (including knowledge of pre-363 Sale events), and are not based on pre-Sale conduct.

New GM also makes two additional arguments that are simply not relevant to any of the issues before this Court. First, New GM argues that Plaintiffs may not be able to prove New GM's knowledge of certain pre-Sale events (whether through imputation by agency, or otherwise).<sup>14</sup> Similarly, New GM argues, even if Plaintiffs prove its knowledge of pre-Sale events, Plaintiffs still might not make out claims under governing state or federal law.<sup>15</sup> If New GM's arguments are correct on the merits, it might prevail on at least some of the claims in the courts in which Plaintiffs' complaints will be adjudicated. However, the issue before this Court

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<sup>13</sup> New GM's argument that consumer protection statutes in certain states may not provide a claim with respect to cars sold pre-Sale is an argument on the merits for resolution by Judge Furman in the MDL litigation and other courts where the claims are pending, and is irrelevant to this Court's gatekeeper determination as to whether the claims are barred by the Sale Order.

<sup>14</sup> See *Omnibus Response by General Motors LLC to the No Strike Pleadings Filed by the States of Arizona and California* [ECF No. 13286 (July 10, 2015)] ("GM Omnibus Resp.") at 21-22; *Response by General Motors LLC to the Ignition Switch Plaintiffs' No Strike Pleading with Regard to the Second Amended Consolidated Complaint; and the Non-Ignition Switch Plaintiffs' Objection Pleading with Regard to the Second Amended Consolidated Complaint* [ECF No. 13316 (July 23, 2015)] ("GM Response re: MDL Complaint").

<sup>15</sup> GM Omnibus Resp. at 22 n.12.

is not whether Plaintiffs will ultimately prevail on their claims, but rather whether the Sale Order prevents them from asserting the claims in the first place. New GM's merits-based attacks pose no bankruptcy bar to claims charging New GM with knowledge of pre-363 Sale facts.

In resolving the Plaintiffs' "No Strike" and related Pleadings, this Court should find that alleging New GM's knowledge of pre-363 Sale facts does not violate the Sale Order.

## **II. FACTUAL BACKGROUND**

### **A. No provisions in the Sale Order bar charging New GM with knowledge of pre-363 Sale facts.**

Because New GM asserts that alleging its knowledge of pre-Sale facts somehow violates the Sale Order, it is incumbent on New GM to identify precisely which language in the Sale Order bars such allegations. New GM cannot do so, as no provisions in either the Sale Order or the Sale Agreement even mention charging New GM with pre-Sale knowledge, whether through imputation or otherwise.

### **B. New GM has always had the same TREAD Act duties with respect to the same Old GM vehicles as did Old GM.**

New GM had ongoing obligations under the TREAD Act (as well as under various state consumer protection statutes) to monitor GM-branded vehicles on the road, to make quarterly reports to NHTSA, and to maintain all relevant records for five years. New GM explicitly assumed this duty in § 6.15 of the Sale Agreement, and hence stood in the role of "manufacturer,"<sup>16</sup> with respect to Old GM cars and parts.

As the Court is aware, the TREAD Act and related regulations require the quarterly submission to NHTSA of "early warning reporting" data, including incidents involving death or

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<sup>16</sup> The TREAD Act on its face imposes recall and reporting obligations only on the "manufacturer" of a vehicle. 49 U.S.C. § 30118(c).

injury, claims relating to property damage received by the manufacturer, warranty claims paid by the manufacturer, consumer complaints, and field reports prepared by the manufacturer's employees or representatives concerning failure, malfunction, lack of durability, or other performance issues. 49 U.S.C. § 30166(m)(3); 49 C.F.R. § 579.21. Manufacturers must retain for five years all underlying records on which the early warning reports are based and all records containing information on malfunctions that may be related to motor vehicle safety. 49 C.F.R. §§ 576.5-576.6.

Old and New GM used several processes to identify safety issues, including the TREAD database and Problem Resolution Tracking System ("PRTS"). *See* Valukas Report at 282-313 (available at <http://www.nhtsa.gov/staticfiles/nvs/pdf/Valukas-report-on-gm-redacted.pdf>). The TREAD database, used to store the data required for the quarterly NHTSA early warning reports, was the principal database used by Old and New GM to track incidents related to GM-branded vehicles. *Id.* at 306. The database included information from (i) customer service requests; (ii) repair orders from dealers; (iii) internal and external surveys; (iv) field reports from employees who bought GM-branded vehicles and from Captured Test Fleet reports;<sup>17</sup> (v) complaints from the OnStar call center; and (vi) a database maintained by GM legal staff to track data concerning complaints filed in court. *Id.* A TREAD reporting team, headed up for both Old and New GM by Dwayne F. Davidson, conducted monthly database searches and prepared scatter graphs to identify spikes in the number of accidents or complaints related to various GM-branded vehicles. *Id.* at 307. Because the same employees carried out the TREAD Act obligations at Old and New

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<sup>17</sup> Captured Test Fleet reports were submitted by employees who were given vehicles and asked to document any problems that arose while driving. Valukas Report at 300. The Quality Group would review, summarize, and group these reports into categories. *Id.*

GM, *see infra* at 8, they not only had knowledge of pre-Sale events—they were required to act on that knowledge under the Sale Agreement in which New GM undertook to monitor Old GM vehicles for safety defects and promptly disclose and remedy any such defects.<sup>18</sup>

**C. The same critical mass of employees worked at New GM in the same capacity with the same authority and the same knowledge they had while working at Old GM.**

New GM essentially continued the operations of Old GM—building the same makes of cars in the same factories with essentially the same personnel. New GM has conceded that “substantially all of Old GM’s employees” were hired by New GM.<sup>19</sup> New GM had TREAD Act responsibilities with respect to all vehicles and parts manufactured by Old GM,<sup>20</sup> as well as those made by New GM. And discovery in the MDL to date has confirmed that—apart from the name of the company—precious little changed after the 363 Sale when Old GM became New GM.<sup>21</sup> [REDACTED]

[REDACTED] <sup>22</sup>

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<sup>18</sup> New GM admitted that it violated these duties with respect to the Ignition Switch Defect. *See* Consent Order, *available at* <http://www.nhtsa.gov/staticfiles/communications/pdf/May-16-2014-TQ14-001-Consent-Order.pdf>, at 4. While New GM may repeat its specious assertion that certain Plaintiffs improperly assert private causes of action under the TREAD Act, not a single count in any of the Plaintiffs’ Complaints does so. In any event, such an argument is merely another merits-based attack to be heard by the court adjudicating Plaintiffs’ Complaints, and can have no bearing on any issue properly before this Court in performing its gate-keeping role.

<sup>19</sup> GM Omnibus Resp. at 20.

<sup>20</sup> Sales Agreement, § 6.15.

<sup>21</sup> *See, e.g.*, May 7, 2015 Deposition of Mark Beauregard at 18:10-19:14 (Exhibit 5); May 15, 2015 Deposition of Dwayne Davidson at 204:21-207:24 (“Davidson Dep.”) (Exhibit 6); June 1, 2015 Deposition of Vipul Modi at 20:18-21:12 (Exhibit 7); June 8, 2015 Deposition of Steven Oakley at 274:1-20 (Exhibit 8); July 15, 2015 Deposition of Deborah Nowak-Vanderhoef at 90:21-92:5 (Exhibit 9); August 26, 2015 Deposition of Douglas Parks at 174:15-175:6 (Exhibit 10); August 26, 2015 Deposition of Peter Judis at 16:6-17:6 (Exhibit 11).

<sup>22</sup> *See id.*

Typical is the testimony of Mr. Davidson, who [REDACTED]

[REDACTED] Mr. Davidson testified that [REDACTED]

[REDACTED]<sup>23</sup> According to Mr. Davidson, [REDACTED]

[REDACTED]<sup>4</sup> [REDACTED]

[REDACTED]<sup>25</sup> [REDACTED]

[REDACTED]<sup>26</sup> [REDACTED]

[REDACTED]<sup>27</sup> [REDACTED]

[REDACTED]<sup>28</sup> [REDACTED]

[REDACTED]<sup>30</sup> [REDACTED]

[REDACTED]<sup>31</sup>

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<sup>23</sup> Davidson Dep. at 205:4-10.

<sup>24</sup> *Id.* at 205:17-25.

<sup>25</sup> *Id.* at 206:2-12.

<sup>26</sup> *Id.* at 206:13-23.

<sup>27</sup> *Id.* at 207:10-22.

<sup>28</sup> *Id.* at 210:16-211:2.

<sup>29</sup> *Id.* at 209:1-23.

<sup>30</sup> *Id.* at 209:24-210:5.

<sup>31</sup> *Id.* at 210:9-11.

New GM's legal department was also comprised of the same personnel as in the days of Old GM. [REDACTED]

[REDACTED]<sup>32</sup> Jaclyn C. Palmer, Michael Gruskin and Doug Brown were among those who were in-house attorneys at both Old and New GM, and attended the Roundtable meetings during which the company discussed whether (and for how much) cases against GM should be settled—including cases involving the Ignition Switch Defect.<sup>33</sup> Although the main function of the Roundtable was to evaluate claims and generate settlement forecasts, the Roundtable “had a second function as well: to spot trends indicating safety issues.”<sup>34</sup> Palmer has stated that “attorneys discussed potential safety or accident trends at Roundtable on occasion, and the Roundtable Committee referred issues to GM engineers for a follow-up investigation.”<sup>35</sup> The Ignition Switch Defect was discussed at Roundtables both before and after the 363 Sale.<sup>36</sup> At Old GM, lawyers were told that “if you as an attorney are aware of any threatened, on-going or past violation of a federal, state or local law or regulation . . . it is your responsibility to respond appropriately.”<sup>37</sup> At New GM, the same lawyers had the same responsibility. Indeed, General Counsel for GM North America, Lucy Clark-Dougherty, recently testified [REDACTED]

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<sup>32</sup> See, e.g., May 19, 2015 Deposition of Jaclyn Palmer at 231:15-19, 247:12-248:5, 267:14-20 (Exhibit 12).

<sup>33</sup> Valukas Report, 106-07.

<sup>34</sup> Valukas Report, 108.

<sup>35</sup> Valukas Report, 108.

<sup>36</sup> See Valukas Report at 110-112 (2006 Roundtable discussions of accidents caused by Ignition Switch Defect); *id.* at 130 (2008 Roundtable discussion of accident caused by Ignition Switch Defect); *id.* at 148 (2011 Roundtable discussion of accident caused by Ignition Switch Defect); *id.* at 163 (2012 Roundtable discussion of accident caused by Ignition Switch Defect).

<sup>37</sup> Valukas Report, 109.

<sup>38</sup> Aug. 13, 2015 Deposition of Lucy Clark-Dougherty at 31:11-33:1, 34:24-35:11, 80:12-23, 121:10-22, 123:1-21 (Exhibit 13).

<sup>39</sup> Valukas Report, 105.

<sup>40</sup> Valukas Report, 106.

<sup>41</sup> Valukas Report, 106.

<sup>42</sup> Pltfs' Stip. Facts, ¶ 14(C); Valukas Report, 112.

<sup>43</sup> Valukas Report, 140, 148.

<sup>44</sup> Pltfs' Stip. Facts, ¶ 14(X).

<sup>45</sup> *Id.*

of 2009, Sprague collected information regarding power mode status, added it to his spreadsheet of airbag nondeployment not-in-suit matters and lawsuits, and discovered that the power mode was recorded as Off or Accessory in a number of accidents.<sup>46</sup> Sprague continued adding to his spreadsheet, and continued his involvement in investigating the Ignition Switch Defect, after he began working for New GM.<sup>47</sup> In fact, Sprague was involved in the 2011 meeting that “kicked-off” the Field Performance Evaluation process in connection with Cobalt airbag nondeployments, at which he expressed “a theory that the airbag non-deployments were connected to [the sensing diagnostic module] receiving a message that the vehicle power mode was in Accessory or Off,” and that “these power-mode messages might be connected to the Ignition Switch.”<sup>48</sup>

As this Court has ruled based on the stipulated factual record:

[A]t least 24 Old GM engineers, senior managers and attorneys knew of the Ignition Switch Defect and the need to send out recall notices—and of the reasons why recall notices had to go out, here. And it is uncontroverted that Old GM had enough knowledge of the Ignition Switch Defect to be required, under the Safety Act, to send out mailed recall notices to owners of affected Old GM vehicles ....

...24 Old GM personnel knew of the need to conduct a recall (and with that, of the need to fix the cars); and, in addition, a critical safety situation....<sup>[49]</sup>

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<sup>46</sup> Valukas Report, 135.

<sup>47</sup> *See, e.g.*, Valukas Report, 148 (Sprague involved in investigating post-Sale crashes involving Ignition Switch Defect).

<sup>48</sup> Valukas Report, 150-154.

<sup>49</sup> *In re Motors Liquidation Corp.*, 529 B.R. at 557.



Based on this “critical mass” of personnel with knowledge of the Ignition Switch Defect, this Court found that the Ignition Switch Defect was known to Old GM such that owners of the vehicles with the Ignition Switch Defect were “known creditors” to Old GM for the purposes of Due Process.<sup>50</sup> As this Court also found, all of these personnel transferred to New GM.<sup>51</sup> There is nothing to suggest they left their knowledge of pre-363 Sale events behind—and it is undisputed that they (and New GM) had the responsibility to act on *all* relevant knowledge, including knowledge of pre-363 Sale events.

### III. ARGUMENT

#### A. New GM can be sued for its own acts and omissions in light of its knowledge without violating the Sale Order, *regardless* of how New GM obtained that knowledge.

Many of the causes of action pled in the Plaintiffs’ Complaints depend, at least in part, on New GM’s knowledge of pre-363 Sale facts—including knowledge of the Ignition Switch Defect and a host of other pre-Sale defects. In general terms, the Plaintiffs allege that, rather than disclose and remedy those defects, New GM knowingly concealed them from regulators, consumers and the public at large.<sup>52</sup> To the extent that it is necessary for Plaintiffs to prove New GM’s knowledge of pre-363 Sale facts, Plaintiffs will have to do so in order to prevail in the

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<sup>50</sup> *Id.* at 558 n.154.

<sup>51</sup> *Id.* at 537.

<sup>52</sup> *See The Ignition Switch Plaintiffs’ No Strike Pleading with Regard to the Second Amended Consolidated Complaint; and the Non-Ignition Switch Plaintiffs’ (I) Objection Pleading with Regard to the Second Amended Consolidated Complaint and (II) GUC Trust Asset Pleading* [ECF No. 13247 (June 24, 2015)] at 9-12, 23-28 (summarizing claims in the Second Amended Consolidated Complaint); *State of Arizona’s “No Strike” Pleading* [ECF No. 13211 (June 16, 2015) (Arizona No Strike Pleading)] at 4-7 (summarizing claims in State of Arizona’s Complaint); *People of the State of California’s “No Strike” Pleading* [ECF No. 13210 (June 16, 2015) (“California No Strike Pleading”)] at 4-7 (summarizing claims in California’s First Amended Complaint).



J.)).<sup>53</sup> Necessarily, given the presence of this same “critical mass” at New GM, 529 B.R. at 537, New GM had knowledge of the Ignition Switch Defect.

Alternatively, under the law of agency in California, Arizona, Michigan, New York and elsewhere, Plaintiffs believe they will be able to show that the knowledge that New GM employees obtained while working at Old GM is attributable to New GM—even if there was not a “critical mass” of personnel with knowledge. Indeed, the law in Arizona, California and across the country broadly imputes an employee’s knowledge to its corporate employer where, as here, the employees are acting in the scope of their employment and that knowledge is germane to their responsibilities. *See, e.g., Fridena v. Evans*, 622 P.2d 463, 466 (Ariz. 1980); Cal. Civ. Code § 2332 (“As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.”); *O’Riordan v. Federal Kemper Life Assurance Co.*, 114 P.3d 753, 757 (Cal. 2005); *Allard v. Arthur Andersen & Co. (USA)*, 924 F. Supp. 488, 494-95 (S.D.N.Y. 1996) (applying New York and Michigan law). Again, each of the 24 Old GM employees that this Court found to be aware of the Ignition Switch Defect remained at New GM in the same or similar roles because New GM chose to keep them there. To impute the knowledge of those employees to New GM does not somehow convert Plaintiffs’ claims into successor liability claims (or any other barred claims based on the acts of Old GM). If New GM or those employees had acted appropriately upon their hiring by New GM to address (rather than

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<sup>53</sup> Plaintiffs note that, unlike this case, *Weisfelner* was an adversary proceeding in which this Court was adjudicating whether or not a claim was stated on the merits. No party in *Weisfelner* argued that imputing knowledge was in violation of any “free and clear” provisions in a sale order.

conceal) the known problems, Plaintiffs would not be seeking to hold New GM liable for its own misconduct.

Contrary to New GM's argument, under agency principles, the knowledge of these employees and counsel may be imputed to New GM.<sup>54</sup> So, for example, under Arizona law, "a corporation is bound by the knowledge acquired by, or notice given to, its agents ... which is within the scope of their authority and which is in reference to a matter to which their authority extends."<sup>55</sup> And employees' knowledge within the scope of their employment is imputed to the corporation even if it is never communicated because Courts impose a conclusive presumption that the agent has discharged his duty to impart to the principal all the knowledge which is necessary for the principal's protection or guidance.<sup>56</sup> Here, it is undisputed that New GM assumed ongoing obligations under the TREAD Act to monitor Old GM vehicles, disclose known defects and order recalls if dictated by safety concerns. Plaintiffs allege that many GM attorneys, engineers, managers, and other personnel who worked at both Old and New GM acquired knowledge of the Ignition Switch Defect and other defects while performing their duties, using systems and procedures that Old and then New GM maintained to comply with Safety Act obligations. *See supra* at 5-12. These facts distinguish this case from the cases cited by New GM declining to find "automatic imputation." *See infra* at 17-19. Hence, while the issue of whether or not Plaintiffs can meet the standards for imputation under agency principles

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<sup>54</sup> *See* Arizona No Strike Pleading at 14-17; California No Strike Pleading at 16-18 (discussing imputation under the law of Arizona, California, New York, and Michigan).

<sup>55</sup> *Fridena v. Evans*, 622 P.2d at 466.

<sup>56</sup> *See, e.g., First Ala. Bank of Montgomery, N.A. v. First State Ins. Co.*, 899 F.2d 1045, 1061 n.8 (11th Cir. 1990).

is not before this Court, Plaintiffs believe they will be able to do so when the issue is properly joined in the courts adjudicating their Complaints.

**C. New GM’s arguments against charging it with knowledge of pre-Sale events are misplaced.**

**1. New GM’s argument against imputing the knowledge its employees obtained while working at Old GM is irrelevant and incorrect.**

New GM argues that “allegations regarding the knowledge of Old GM employees who became New GM employees” should be stricken from Plaintiffs’ Complaints because Plaintiffs cannot meet the requirements for imputation under governing state or federal law.<sup>57</sup> But that argument misses the mark, since the issue before this Court is *not* whether Plaintiffs will be successful in charging New GM with the knowledge of its employees (whether by imputation or otherwise), but whether Plaintiffs are allowed to make the attempt.<sup>58</sup>

The issues of what knowledge New GM had, and whether New GM’s conduct in light of that knowledge subjects it to liability, are ultimately for the courts adjudicating Plaintiffs’ claims on the merits. Plaintiffs will nonetheless address New GM’s argument that “the knowledge of Old GM’s employees cannot be automatically imputed to New GM simply because they went to work for New GM after the closing of the 363 Sale.”<sup>59</sup> Whether or not New GM’s “automatic imputation” argument is correct under the law of any relevant jurisdiction, Plaintiffs do *not* seek

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<sup>57</sup> See *Response by General Motors LLC to Adams Plaintiffs’ No Dismissal Pleading* [ECF No. 13422 (Sept. 3, 2015) (“*Adams Resp.*”)] at 14-16.

<sup>58</sup> New GM puts the cart before the horse when it states: “That New GM hired many of Old GM’s employees who may have knowledge of something does not change the fact that ... the underlying claim is based on Old GM’s conduct....” *Adams Resp.* at 15. New GM’s argument—that a barred claim cannot be saved by imputation—does not logically advance its claim that imputation is automatically barred.

<sup>59</sup> *Adams Resp.* at 15.



on the grounds that one of his prior employees, Crider, was aware of the alleged fraud before he became an employee of Chamberlain. *Id.* at \*2. Under governing Washington agency law, “knowledge may be imputed if it relates to the subject matter of the agency, and the agent acquired it while acting within the scope of his or her authority.” *Goodman v. Boeing Co.*, 75 Wash. App. 60, 86 (1994). Hence, the *Chamberlain* court found, “Crider’s knowledge ... cannot be imputed ... because Crider ... acquired knowledge of the alleged fraud before being hired by Chamberlain.” *Nassimi*, 2010 WL 1875923, at \*6. Here, in stark contrast, the same “critical mass” of Old GM employees continued on in their same roles with New GM—hence, they had and used knowledge of pre-Sale events while acting within the scope of their authority at New GM.<sup>61</sup> Moreover, to the extent *Nassimi* accurately describes Washington law as disallowing imputation of knowledge acquired prior to the agency relationship, Plaintiffs note that the law in other jurisdictions differs. So, for example, in California, the principal is “charged with knowledge which his agent acquires before the commencement of the relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal,”<sup>62</sup> and in Arizona a corporation is bound by the knowledge of its agents so long as the knowledge is “within the scope of their authority and ... is in reference to a matter to which their authority extends.”<sup>63</sup>

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<sup>61</sup> *Forest Labs., Inc. v. The Pillsbury Co.*, 452 F. 2d 621, 626 (7th Cir. 1971), likewise holds merely that “the knowledge of the [seller’s] employees cannot properly be imputed to [the purchaser] just because they went to work for the [the purchaser].” Once again, the critical mass of employees with knowledge here necessarily had, and were required to act on, that knowledge given their duties and New GM’s ongoing TREAD Act obligations.

<sup>62</sup> *Columbia Pictures Corp. v. De Toth*, 87 Cal. App. 2d 620, 631 (1948).

<sup>63</sup> *Fridena*, 622 P.2d at 466.

Finally, New GM can draw no support from its citation to *Interstate Power Co. v. Kansas City Power & Light Co.*, 909 F. Supp. 1241, 1272 (N.D. Iowa 1993). While that decision indeed rejected the argument that “the knowledge of [the seller’s] employees ... should be imputed to [the purchaser],” the court did so because “[a]t best the evidence shows that a handful of [the seller’s] employees had knowledge [of the relevant issue] and none of them had any reason to raise the issue after becoming employees of [the buyer.]” *Id.* Here, in stark contrast, a “critical mass” of New GM employees had knowledge of the Ignition Switch Defect and, acting within the scope of their authority in carrying out New GM’s TREAD Act obligations, they had every reason and obligation to raise the issues after they became employees of New GM.

In sum, under the facts of this case, Plaintiffs will be able to satisfy the requirements for imputation under the agency law of most or all relevant jurisdictions.

**2. The language of the Sale Agreement does not bar allegations that New GM had knowledge of pre-Sale facts.**

New GM argues that imputation of pre-bankruptcy facts is somehow barred because “the Sale Agreement contemplated that (a) substantially all of Old GM’s employees would be hired by New GM ... (*see* Sale Agreement § 6.17(a)), and (b) the hiring of such employees would not transform Retained Liabilities based on Old GM’s knowledge and conduct into, essentially, a new and unexpressed category of Assumed Liabilities of New GM.”<sup>64</sup> But New GM’s argument here is circular at best.

New GM simply assumes (without explaining why) claims based in part on New GM’s knowledge of pre-Sale events are “Retained Liabilities based on Old GM’s knowledge and conduct....” But claims based on New GM’s knowledge (and its actions and failures to act in

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<sup>64</sup> GM Omnibus Resp. at 20.



light of that knowledge) cannot be converted into Retained Liabilities merely because New GM's knowledge relates to facts that occurred prior to the 363 Sale. Instead, as this Court held, it is claims based on "wrongful **conduct** by Old GM" that are "actually claims against Old GM" and therefore generally proscribed by the Sale Agreement, the Sale Order and the Decision. *See* 529 B.R. at 528.

Differently put, suppose that New GM had chosen to terminate each of the 24 employees with knowledge of the Ignition Switch Defect, and assume (contrary to reality) that those were the only 24 employees with knowledge of the Ignition Switch Defect. Further suppose that, shortly after New GM came into existence, its new TREAD team reviewed all the relevant records of Old GM and became fully aware of the Ignition Switch Defect. In that scenario, not even New GM could claim that attempts to hold it liable for its subsequent actions and inactions in connection with the Ignition Switch Defect were barred by the Sale Order. And New GM has offered no reason why the result should be different simply because it kept those 24 employees (and their knowledge) through the changeover to New GM.

#### IV. CONCLUSION

For the reasons stated above, Plaintiffs respectfully submit that the knowledge of New GM employees can be charged to New GM without violating the Sale Order, regardless of whether that knowledge was gained while working for Old GM, reviewing Old GM records while working at New GM, or independently acquired at New GM.

Dated: September 18, 2015

**HAGENS BERMAN SOBOL SHAPIRO LLP**

*/s/ Steve W. Berman*

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and the Adams Plaintiffs*

## CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2015, I caused the foregoing to be filed and served upon all parties receiving notice via the Court's ECF system.

Dated: September 18, 2015

/s/ Steve W. Berman  
Steve W. Berman (*pro hac vice*)  
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1918 Eighth Avenue, Suite 3300  
Seattle, Washington 98101  
Tel.: 206-623-7292  
steve@hbsslaw.com

# Exhibit 1

PREET BHARARA  
United States Attorney for the  
Southern District of New York  
By: JASON H. COWLEY  
ALEXANDER J. WILSON

Assistant United States Attorneys  
One St. Andrew's Plaza  
New York, New York 10007

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - -X

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	<u>VERIFIED COMPLAINT</u>
	:	
-v.-	:	15 Civ. ____
	:	
\$900,000,000 in United States	:	
Currency,	:	
	:	
Defendant in rem.	:	
	:	
- - - - -X		

Plaintiff United States of America, by its attorney, PREET BHARARA, United States Attorney for the Southern District of New York, for its Verified Complaint (the "Complaint") alleges, upon information and belief, as follows:

I. JURISDICTION AND VENUE

1. This action is brought by the United States of America pursuant to 18 U.S.C. § 981(a)(1)(C), seeking the forfeiture of \$900,000,000 in United States Currency (the "Defendant Funds" or the "defendant-in-rem").



2. This Court has jurisdiction pursuant to 28 U.S.C. § 1355.

3. Venue is proper pursuant to 28 U.S.C. § 1355(b)(1)(A) because certain acts and omissions giving rise to the forfeiture took place in the Southern District of New York, and pursuant to Title 28, United States Code, Section 1395 because the defendant-in-rem shall be transferred to the Southern District of New York.

4. The Defendant Funds represent property constituting and derived from proceeds of wire fraud in violation of Title 18, United States Code, Sections 1343, and property traceable to such property; and are thus subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C).

## II. PROBABLE CAUSE FOR FORFEITURE

5. General Motors Company ("GM"), an automotive company headquartered in Detroit, Michigan, entered into a Deferred Prosecution Agreement with the United States, wherein, *inter alia*, GM agreed to forfeit a total of \$900,000,000, i.e., the Defendant Funds, to the United States. GM agrees that the Defendant Funds are substitute *res* for the proceeds of GM's wire fraud offense. The Deferred Prosecution Agreement, with the

accompanying Statement of Facts and Information, is attached as Exhibit A and incorporated herein.

### III. CLAIM FOR FORFEITURE

6. The allegations contained in paragraphs one through five of this Verified Complaint are incorporated by reference herein.

7. Title 18, United States Code, Section 981(a)(1)(C) subjects to forfeiture "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense."

8. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7) to include any offense under 18 U.S.C. § 1961(1). Section 1961(1) lists, among others offenses, violations of Title 18, United States Code, Section 1343 (relating to wire fraud).

9. By reason of the foregoing, the defendant-in-rem is subject to forfeiture to the United States of America pursuant to Title 18, United States Code, Section 981(a)(1)(C), as it is substitute res for property derived from wire fraud, in violation of Title 18, United States Code, Section 1343.

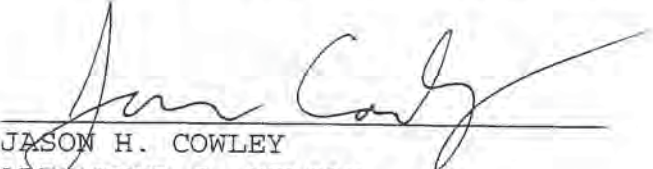


WHEREFORE, plaintiff United States of America prays that process issue to enforce the forfeiture of the defendant-in-rem and that all persons having an interest in the defendant-in-rem be cited to appear and show cause why the forfeiture should not be decreed, and that this Court decree forfeiture of the defendant-in-rem to the United States of America for disposition according to law, and that this Court grant plaintiff such further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Dated: New York, New York  
September 16, 2015

PREET BHARARA  
United States Attorney for  
Plaintiff United States of America

By:

  
JASON H. COWLEY  
ALEXANDER J. WILSON  
Assistant United States Attorneys  
One St. Andrew's Plaza  
New York, New York 10007  
(212) 637-2200

VERIFICATION

STATE OF NEW YORK )  
COUNTY OF NEW YORK :  
SOUTHERN DISTRICT OF NEW YORK )

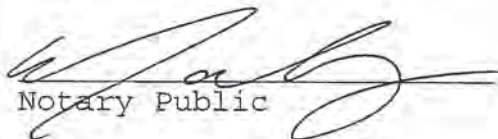
KENNETH W. JACOUTOT, being duly sworn, deposes and says that he is a Special Agent with the United States Department of Transportation, Office of Inspector General; that he has read the foregoing Verified Complaint and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

The sources of deponent's information and the grounds of his belief are his personal involvement in the investigation, and conversations with and documents prepared by law enforcement officers and others.



Kenneth W. Jacoutot  
Special Agent  
Department of Transportation,  
Office of Inspector General

Sworn to before me this  
16 th day of September, 2015



Notary Public

# Exhibit A



U.S. Department of Justice

United States Attorney  
Southern District of New York

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*The Silvio J. Mollo Building  
One Saint Andrew's Plaza  
New York New York 10007*

September 16, 2015

Anton R. Valukas, Esq.  
Reid J. Schar, Esq.  
Anthony S. Barkow, Esq.  
Jenner & Block LLP  
919 Third Avenue  
New York, NY 10022

**Re: General Motors Company – Deferred Prosecution Agreement**

Dear Messrs. Valukas, Schar, and Barkow:

Pursuant to the understandings specified below, the Office of the United States Attorney for the Southern District of New York (the “Office”) and the defendant General Motors Company (“GM”),<sup>1</sup> under authority granted by its Board of Directors in the form of the written authorization attached as Exhibit A, hereby enter into this Deferred Prosecution Agreement (the “Agreement”).

**The Criminal Information**

1. GM consents to the filing of a two-count Information (the “Information”) in the United States District Court for the Southern District of New York (the “Court”), charging GM with engaging in a scheme to conceal a deadly safety defect from its U.S. regulator, in violation of Title 18, United States Code, Section 1001, and committing wire fraud, in violation of Title 18, United States Code, Section 1343. A copy of the Information is attached as Exhibit B. This Agreement shall take effect upon its execution by both parties.

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<sup>1</sup> For the purposes of this Deferred Prosecution Agreement, to the extent any conduct, statement, actions, or documents occurred on or are dated before July 10, 2009, references to “GM” shall mean and are intended to mean solely “Motors Liquidation Company,” previously known as General Motors Corporation (“Old GM”). Although New GM in the Statement of Facts attached as Exhibit C hereto admits certain facts about Old GM’s acts, conduct, or knowledge prior to July 10, 2009 based on New GM’s current knowledge, New GM does not intend those admissions to imply or suggest that New GM is responsible for any acts, conduct or knowledge of Old GM, or that such acts, conduct, and knowledge of Old GM can be imputed to New GM. The Statement of Facts is not intended to alter, modify, expand, or otherwise affect any provision of the July 5, 2009 Sale Order that was issued by the U.S. Bankruptcy Court for the Southern District of New York, or the rights, protections, and responsibilities of New GM under the Sale Order..



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### Acceptance of Responsibility

2. GM admits and stipulates that the facts set forth in the Statement of Facts attached as Exhibit C and incorporated herein are true and accurate. In sum, GM admits that it failed to disclose to its U.S. regulator and the public a potentially lethal safety defect that caused airbag non-deployment in certain GM model cars, and that GM further affirmatively misled consumers about the safety of GM cars afflicted by the defect.

### Forfeiture

3. As a result of the conduct described in the Information and the Statement of Facts, GM agrees to pay to the United States \$900 million (the "Stipulated Forfeiture Amount") representing the proceeds resulting from such conduct. GM agrees that the allegations contained in the Information and the facts set forth in the Statement of Facts are sufficient to establish that the Stipulated Forfeiture Amount is subject to civil forfeiture to the United States and that this Agreement, Information, and Statement of Facts may be attached to and incorporated into the Civil Forfeiture Complaint to be filed against the Stipulated Forfeiture Amount, a copy of which is attached as Exhibit D hereto. By this Agreement, GM specifically waives service of said Civil Forfeiture Complaint and agrees that a Final Order of Forfeiture may be entered against the Stipulated Forfeiture Amount. Upon payment of the Stipulated Forfeiture Amount, GM shall release any and all claims it may have to such funds and execute such documents as necessary to accomplish the forfeiture of the funds. GM agrees that it will not file a claim with the Court or otherwise contest the civil forfeiture of the Stipulated Forfeiture Amount and will not assist a third party in asserting any claim to the Stipulated Forfeiture Amount. GM agrees that the Stipulated Forfeiture Amount shall be treated as a penalty paid to the United States government for all purposes, including all tax purposes. GM agrees that it will not claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, local, or foreign tax for any fine or forfeiture paid pursuant to this Agreement.

4. GM shall transfer \$900 million to the United States by no later than September 24, 2015 (or as otherwise directed by the Office following such date). Such payment shall be made by wire transfer to the United States Marshals Service, pursuant to wire instructions provided by the Office. If GM fails to timely make the payment required under this paragraph, interest (at the rate specified in Title 28, United States Code, Section 1961) shall accrue on the unpaid balance through the date of payment, unless the Office, in its sole discretion, chooses to reinstate prosecution pursuant to paragraphs 10 and 11 below.

### Obligation to Cooperate

5. GM has cooperated with this Office's criminal investigation and agrees to cooperate fully and actively with the Office, the Federal Bureau of Investigation ("FBI"), the Department of Transportation ("DOT"), the Office of the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP"), the National Highway Traffic Safety Administration ("NHTSA"), and any other agency of the government designated by the Office

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regarding any matter relating to the Office's investigation about which GM has knowledge or information.

6. It is understood that GM shall (a) truthfully and completely disclose all information with respect to the activities of itself and its subsidiaries, as well as with respect to the activities of officers, agents, and employees of GM and its subsidiaries, concerning all matters about which the Office inquires of it, which information can be used for any purpose; (b) cooperate fully with the Office, FBI, DOT, SIGTARP, NHTSA, and any other law enforcement agency designated by the Office; (c) attend all meetings at which the Office requests its presence and use its best efforts to secure the attendance and truthful statements or testimony of any past or current officers, agents, or employees of GM or its subsidiaries at any meeting or interview or before the grand jury or at trial or at any other court proceeding; (d) provide to the Office upon request any document, record, or other tangible evidence relating to matters about which the Office or any designated law enforcement agency inquires of it; (e) assemble, organize, and provide in a responsive and prompt fashion, and upon request, on an expedited schedule, all documents, records, information and other evidence in GM's possession, custody or control as may be requested by the Office, FBI, DOT, SIGTARP, NHTSA, or designated law enforcement agency; (f) volunteer and provide to the Office any information and documents that come to GM's attention that may be relevant to the Office's investigation of this matter, any issue related to the Statement of Facts, and any issue that would fall within the scope of the duties of the independent monitor (the "Monitor") as set forth in paragraph 15; (g) provide testimony or information necessary to identify or establish the original location, authenticity, or other basis for admission into evidence of documents or physical evidence in any criminal or other proceeding as requested by the Office, FBI, DOT, SIGTARP, NHTSA, or designated law enforcement agency, including but not limited to information and testimony concerning the conduct set forth in the Information and Statement of Facts; (h) bring to the Office's attention all criminal conduct by or criminal investigations of GM or any of its agents or employees acting within the scope of their employment related to violations of the federal laws of the United States, as to which GM's Board of Directors, senior management, or United States legal and compliance personnel are aware; (i) bring to the Office's attention any administrative or regulatory proceeding or civil action brought by or investigation conducted by any U.S. governmental authority that alleges fraud by GM; and (j) commit no crimes whatsoever under the federal laws of the United States subsequent to the execution of this Agreement. In the event the Office determines that information it receives from GM pursuant to this provision should be shared with DOT and/or NHTSA, the Office may request that GM provide such information to DOT and/or NHTSA directly. GM will submit such information to DOT and/or NHTSA consistent with the regulatory provisions related to the protection of confidential business information contained in 49 C.F.R. Part 512 and 49 C.F.R. Part 7. Nothing in this Agreement shall be construed to require GM to provide any information, documents or testimony protected by the attorney-client privilege, work product doctrine, or any other applicable privilege.

7. GM agrees that its obligations pursuant to this Agreement, which shall commence upon the signing of this Agreement, will continue for three years from the date of the

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Court's acceptance of this Agreement, unless otherwise extended pursuant to paragraph 12 below. GM's obligation to cooperate is not intended to apply in the event that a prosecution against GM by this Office is pursued and not deferred.

### Deferral of Prosecution

8. In consideration of GM's entry into this Agreement, the actions it has taken to date to demonstrate acceptance and acknowledgement of responsibility for its conduct (including, among other things, conducting a swift and robust internal investigation, furnishing this Office with a continuous flow of unvarnished facts gathered during the course of that internal investigation, voluntarily providing, without prompting, certain documents and information otherwise protected by the attorney-client privilege, providing timely and meaningful cooperation more generally in the investigation conducted by this Office, terminating wrongdoers, and establishing a full and independent victim compensation program that has to date paid out hundreds of millions of dollars in awards), and its commitment to: (a) continue to accept and acknowledge responsibility for its conduct; (b) continue to cooperate with the Office, FBI, DOT, SIGTARP, NHTSA, and any other law enforcement agency designated by this Office; (c) make the payments specified in this Agreement; (d) comply with Federal criminal laws; and (e) otherwise comply with all of the terms of this Agreement, the Office shall recommend to the Court that prosecution of GM on the Information be deferred for three years from the date of the signing of this Agreement. GM shall expressly waive indictment and all rights to a speedy trial pursuant to the Sixth Amendment of the United States Constitution, Title 18, United States Code, Section 3161, Federal Rule of Criminal Procedure 48(b), and any applicable Local Rules of the United States District Court for the Southern District of New York for the period during which this Agreement is in effect. GM shall expressly waive any objection to venue with respect to any charges arising out of the conduct described in the Statement of Facts and shall expressly consent to the filing of the Information in the Southern District of New York.

9. It is understood that this Office cannot, and does not, agree not to prosecute GM for criminal tax violations. However, if GM fully complies with the terms of this Agreement, no testimony given or other information provided by GM (or any other information directly or indirectly derived therefrom) will be used against GM in any criminal tax prosecution. In addition, the Office agrees that, if GM is in compliance with all of its obligations under this Agreement, the Office will, within thirty (30) days after the expiration of the period of deferral (including any extensions thereof), seek dismissal with prejudice as to GM of the Information filed against GM pursuant to this Agreement. Except in the event of a violation by GM of any term of this Agreement, the Office will bring no additional charges against GM, except for criminal tax violations, relating to its conduct as described in the admitted Statement of Facts. This Agreement does not provide any protection against prosecution for any crimes except as set forth above and does not apply to any individual or entity other than GM and its subsidiaries. GM and the Office understand that the Agreement to defer prosecution of GM must be approved by the Court, in accordance with 18 U.S.C. § 3161(h)(2). Should the Court decline to approve the Agreement to defer prosecution for any reason, both the Office and GM are released from any

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obligation imposed upon them by this Agreement, and this Agreement shall be null and void, except for the tolling provision set forth in paragraph 10.

10. It is further understood that should the Office in its sole discretion determine based on facts learned subsequent to the execution of this Agreement that GM has: (a) knowingly given false, incomplete or misleading information to the Office, FBI, DOT, SIGTARP, or NHTSA, either during the term of this Agreement or in connection with the Office's investigation of the conduct described in the Information and Statement of Facts, (b) committed any crime under the federal laws of the United States subsequent to the execution of this Agreement, or (c) otherwise violated any provision of this Agreement, GM shall, in the Office's sole discretion, thereafter be subject to prosecution for any federal criminal violation of which the Office has knowledge, including but not limited to a prosecution based on the Information, the Statement of Facts, or the conduct described therein. Any such prosecution may be premised on any information provided by or on behalf of GM to the Office and/or FBI, DOT, SIGTARP, or NHTSA at any time. In any such prosecution, no charge would be time-barred provided that such prosecution is brought within the applicable statute of limitations period, excluding (a) any period subject to any prior or existing tolling agreement between the Office and GM and (b) the period from the execution of this Agreement until its termination. GM agrees to toll, and exclude from any calculation of time, the running of the applicable criminal statute of limitations for the length of this Agreement starting from the date of the execution of this Agreement and including any extension of the period of deferral of prosecution pursuant to paragraph 12 below. By this Agreement, GM expressly intends to and hereby does waive its rights in the foregoing respects, including any right to make a claim premised on the statute of limitations, as well as any constitutional, statutory, or other claim concerning pre-indictment delay. Such waivers are knowing, voluntary, and in express reliance on the advice of GM's counsel.

11. It is further agreed that in the event that the Office, in its sole discretion, determines that GM has violated any provision of this Agreement, including by failure to meet its obligations under this Agreement: (a) all statements made by or on behalf of GM to the Office, FBI, DOT, SIGTARP, and/or NHTSA, including but not limited to the Statement of Facts, or any testimony given by GM or by any agent of GM before a grand jury, or elsewhere, whether before or after the date of this Agreement, or any leads from such statements or testimony, shall be admissible in evidence in any and all criminal proceedings hereinafter brought by the Office against GM; and (b) GM shall not assert any claim under the United States Constitution, Rule 11(f) of the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules of Evidence, or any other federal rule, that statements made by or on behalf of GM before or after the date of this Agreement, or any leads derived therefrom, should be suppressed or otherwise excluded from evidence. It is the intent of this Agreement to waive any and all rights in the foregoing respects.

12. GM agrees that, in the event that the Office determines during the period of deferral of prosecution described in paragraph 8 above (or any extensions thereof) that GM has violated any provision of this Agreement, an extension of the period of deferral of prosecution



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may be imposed in the sole discretion of the Office, up to an additional one year, but in no event shall the total term of the deferral-of-prosecution period of this Agreement exceed four (4) years.

13. GM, having truthfully admitted to the facts in the Statement of Facts, agrees that it shall not, through its attorneys, agents, or employees, make any statement, in litigation or otherwise, contradicting the Statement of Facts or its representations in this Agreement. Consistent with this provision, GM may raise defenses and/or assert affirmative claims and defenses in any proceedings brought by private and/or public parties as long as doing so does not contradict the Statement of Facts or such representations. Any such contradictory statement by GM, its present or future attorneys, agents, or employees shall constitute a violation of this Agreement and GM thereafter shall be subject to prosecution as specified in paragraphs 8 through 11, above, or the deferral-of-prosecution period shall be extended pursuant to paragraph 12, above. The decision as to whether any such contradictory statement will be imputed to GM for the purpose of determining whether GM has violated this Agreement shall be within the sole discretion of the Office. Upon the Office's notifying GM of any such contradictory statement, GM may avoid a finding of violation of this Agreement by repudiating such statement both to the recipient of such statement and to the Office within two business days after having been provided notice by the Office. GM consents to the public release by the Office, in its sole discretion, of any such repudiation. Nothing in this Agreement is meant to affect the obligation of GM or its officers, directors, agents or employees to testify truthfully to the best of their personal knowledge and belief in any proceeding.

14. GM agrees that it is within the Office's sole discretion to choose, in the event of a violation, the remedies contained in paragraphs 10 and 11 above, or instead to choose to extend the period of deferral of prosecution pursuant to paragraph 12. GM understands and agrees that the exercise of the Office's discretion under this Agreement is unreviewable by any court. Should the Office determine that GM has violated this Agreement, the Office shall provide notice to GM of that determination and provide GM with an opportunity to make a presentation to the Office to demonstrate that no violation occurred, or, to the extent applicable, that the violation should not result in the exercise of those remedies or in an extension of the period of deferral of prosecution, including because the violation has been cured by GM.

#### **Independent Monitor**

15. GM agrees to retain a Monitor upon selection by the Office and approval by the Office of the Deputy Attorney General, whose powers, rights and responsibilities shall be as set forth below.

(a). Jurisdiction, Powers, and Oversight Authority. To address issues related to the Statement of Facts and Information, the Monitor shall have the authorities and duties defined below. The scope of the Monitor's authority is to review and assess GM's policies, practices or procedures as set forth below, and is not intended to include substantive review of the correctness of any of GM's prior, present, or future decisions relating to compliance with NHTSA's regulatory regime, including the National Traffic and Motor Vehicle

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Safety Act, its implementing regulations, and related policies. Nor is it intended to supplant NHTSA's authority over decisions related to motor vehicle safety. Except as expressly set forth below, the authority granted below shall not include the authority to exercise oversight, or to participate in, decisions by GM about product offerings, decisions relating to product development, engineering of GM vehicles, capital allocation, and investment decisions.

(1). Review and assess the efficacy of GM's current policies, practices, and procedures in ensuring that GM corrects prior statements and assurances concerning motor vehicle safety;

(2). Review and assess the effectiveness of GM's current policies, practices, or procedures for sharing allegations and engineering analyses associated with lawsuits and not-in-suit matters with those responsible for recall decisions;

(3). Review and assess GM's current compliance with its stated recall processes; and

(4). Review and assess the adequacy of GM's current procedures for addressing known defects in certified pre-owned vehicles.

It is the intent of this Agreement that the provisions regarding the Monitor's jurisdiction, powers, and oversight authority and duties be broadly construed, subject to the following limitation: the Monitor's responsibilities shall be limited to GM's activities in the United States, and to the extent the Monitor seeks information outside the United States, compliance with such requests shall be consistent with the applicable legal principles in that jurisdiction. GM shall adopt all recommendations submitted by the Monitor unless GM objects to any recommendation and the Office agrees that adoption of such recommendation should not be required.

(b). Access to Information. The Monitor shall have the authority to take such reasonable steps, in the Monitor's view, as necessary to be fully informed about those operations of GM within or relating to his or her jurisdiction. To that end, the Monitor shall have:

(1). Access to, and the right to make copies of, any and all non-privileged books, records, accounts, correspondence, files, and any and all other documents or electronic records, including e-mails, of GM and its subsidiaries, and of officers, agents, and employees of GM and its subsidiaries, within or relating to his or her jurisdiction that are located in the United States; and

(2). The right to interview any officer, employee, agent, or consultant of GM conducting business in or present in the United States and to participate in any meeting in the United States concerning any matter within or relating to the Monitor's jurisdiction.

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To the extent that the Monitor seeks access to information contained within privileged documents or materials, GM shall use its best efforts to provide the Monitor with the information without compromising the asserted privilege.

(c). Confidentiality.

(1). The Monitor shall maintain the confidentiality of any non-public information entrusted or made available to the Monitor. The Monitor shall share such information only with the Office, FBI and SIGTARP. The Monitor may also determine that such information should be shared with DOT and/or NHTSA. In the event of such a determination, the Monitor may request that GM provide the subject information directly to DOT and/or NHTSA. GM will submit such information to DOT or NHTSA consistent with the regulatory provisions related to the protection of confidential business information contained in 49 C.F.R. Part 512 and 49 C.F.R. Part 7.

(2). The Monitor shall sign a non-disclosure agreement with GM prohibiting disclosure of information received from GM to anyone other than to the Office, FBI, DOT, SIGTARP or NHTSA, and anyone hired by the Monitor. Within thirty days after the end of the Monitor's term, the Monitor shall either return anything obtained from GM, or certify that such information has been destroyed. Anyone hired by the Monitor shall also sign a non-disclosure agreement with similar return or destruction requirements as set forth in this subparagraph.

(d). Hiring Authority. The Monitor shall have the authority to employ legal counsel, consultants, investigators, experts, and any other personnel necessary to assist in the proper discharge of the Monitor's duties.

(e). Implementing Authority. The Monitor shall have the authority to take any other actions in the United States that are necessary to effectuate the Monitor's oversight and monitoring responsibilities.

(f). Miscellaneous Provisions.

(1). Term. The Monitor's authority set forth herein shall extend for a period of three years from the commencement of the Monitor's duties, except that (a) in the event the Office determines during the period of the Monitorship (or any extensions thereof) that GM has violated any provision of this Agreement, an extension of the period of the Monitorship may be imposed in the sole discretion of the Office, up to an additional one-year extension, but in no event shall the total term of the Monitorship exceed the term of the Agreement; and (b) in the event the Office, in its sole discretion, determines during the period of the Monitorship that the employment of a Monitor is no longer necessary to carry out the purposes of this Agreement, the Office may shorten the period of the Monitorship.

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(2). Selection of the Monitor. The Office shall consult with GM, including soliciting nominations from GM, using its best efforts to select and appoint a mutually acceptable Monitor (and any replacement Monitors, if required) as promptly as possible. In the event that the Office is unable to select a Monitor acceptable to GM, the Office shall have the sole right to select a monitor (and any replacement Monitors, if required). To ensure the integrity of the Monitorship, the Monitor must be independent and objective and the following persons shall not be eligible as either a Monitor or an agent, consultant or employee of the Monitor: (a) any person previously employed by GM; or (b) any person who has been directly adverse to GM in any proceeding. The selection of the Monitor must be approved by the Deputy Attorney General.

(3). Notice regarding the Monitor; Monitor's Authority to Act on Information received from Employees; No Penalty for Reporting. GM shall establish an independent, toll-free answering service to facilitate communication anonymously or otherwise with the Monitor. Within 10 days of the commencement of the Monitor's duties, GM shall advise its employees of the appointment of the Monitor, the Monitor's powers and duties as set forth in this Agreement, the toll-free number established for contacting the Monitor, and email and mail addresses designated by the Monitor. Such notice shall inform employees that they may communicate with the Monitor anonymously or otherwise, and that no agent, consultant, or employee of GM shall be penalized in any way for providing information to the Monitor. In addition, such notice shall direct that, if an employee is aware of any violation of any law or any unethical conduct that has not been reported to an appropriate federal, state or municipal agency, the employee is obligated to report such violation or conduct to GM's compliance office in the United States or the Monitor. The Monitor shall have access to all communications made using this toll-free number. The Monitor has the sole discretion to determine whether the toll-free number is sufficient to permit confidential and/or anonymous communications or whether the establishment of an additional toll-free number is required. Further, the Monitor shall inform GM of communications made to the Monitor regarding motor vehicle safety so that GM can address any allegations consistent with its Code of Conduct and related policies and procedures.

(4). Reports to the Office. The Monitor shall keep records of his or her activities, including copies of all correspondence and telephone logs, as well as records relating to actions taken in response to correspondence or telephone calls. If potentially illegal or unethical conduct is reported to the Monitor, the Monitor may, at his or her option, conduct an investigation, and/or refer the matter to the Office. The Monitor should, at his or her option, refer any potentially illegal or unethical conduct to GM's compliance office. The Monitor may report to the Office whenever the Monitor deems fit but, in any event, shall file a written report not less often than every four months regarding: the Monitor's activities; whether GM is complying with the terms of this Agreement; and any changes that are necessary to foster GM's compliance with any applicable laws, regulations and standards related to the Monitor's jurisdiction as set forth in paragraph 15(a). Such periodic written reports are to be provided to GM and the Office. The Office may, in its sole discretion, provide to FBI and SIGTARP all or part of any such periodic written report, or other information provided to the Office by the Monitor. The Office may also



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determine that all or part of any such periodic report, or other information provided to the Office by the Monitor, be provided to DOT and/or NHTSA. In the event of such a determination, the Office may request that GM transmit such report, part of a report, and/or non-public information to DOT and/or NHTSA directly. GM will submit such report, part of a report, and/or non-public information to DOT and/or NHTSA consistent with the regulatory provisions related to the protection of confidential business information contained in 49 C.F.R. Part 512 and 49 C.F.R. Part 7. GM may provide all or part of any periodic written reports to NHTSA or other federal agencies or governmental entities. Should the Monitor determine that it appears that GM has violated any law, has violated any provision of this Agreement, or has engaged in any conduct that could warrant the modification of his or her jurisdiction, the Monitor shall promptly notify the Office, and when appropriate, GM.

(5). Cooperation with the Monitor. GM and all of its officers, directors, employees, agents, and consultants, and all of the officers, directors, employees, agents, and consultants of GM's subsidiaries shall have an affirmative duty to cooperate with and assist the Monitor in the execution of his or her duties provided in this Agreement and shall inform the Monitor of any non-privileged information that may relate to the Monitor's duties or lead to information that relates to his or her duties. Failure of any GM officer, director, employee, or agent to cooperate with the Monitor may, in the sole discretion of the Monitor, serve as a basis for the Monitor to recommend dismissal or other disciplinary action.

(6). Compensation and Expenses. Although the Monitor shall operate under the supervision of the Office, the compensation and expenses of the Monitor, and of the persons hired under his or her authority, shall be paid by GM. The Monitor, and any persons hired by the Monitor, shall be compensated in accordance with their respective typical hourly rates. GM shall pay bills for compensation and expenses promptly, and in any event within 30 days. In addition, within one week after the selection of the Monitor, GM shall make available office space, telephone service and clerical assistance sufficient for the Monitor to carry out his or her duties.

(7). Indemnification. GM shall provide an appropriate indemnification agreement to the Monitor with respect to any claims arising out of the performance of the Monitor's duties.

(8). No Affiliation. The Monitor is not, and shall not be treated for any purpose, as an officer, employee, agent, or affiliate of GM.

#### Limits of this Agreement

16. It is understood that this Agreement is binding on the Office but does not bind any other Federal agencies, any state or local law enforcement agencies, any licensing authorities, or any regulatory authorities. However, if requested by GM or its attorneys, the Office will bring to the attention of any such agencies, including but not limited to any regulators,

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as applicable, this Agreement, the cooperation of GM, and GM's compliance with its obligations under this Agreement.

#### Public Filing

17. GM and the Office agree that, upon the submission of this Agreement (including the Statement of Facts and other attachments) to the Court, this Agreement and its attachments shall be filed publicly in the proceedings in the United States District Court for the Southern District of New York.

18. The parties understand that this Agreement reflects the unique facts of this case and is not intended as precedent for other cases.

#### Execution in Counterparts

19. This Agreement may be executed in one or more counterparts, each of which shall be considered effective as an original signature.


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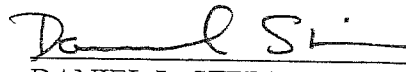
Integration Clause

20. This Agreement sets forth all the terms of the Deferred Prosecution Agreement between GM and the Office. No modifications or additions to this Agreement shall be valid unless they are in writing and signed by the Office, GM's attorneys, and a duly authorized representative of GM.

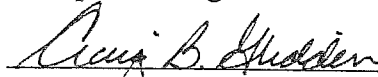
PREET BHARARA  
United States Attorney  
Southern District of New York

By:

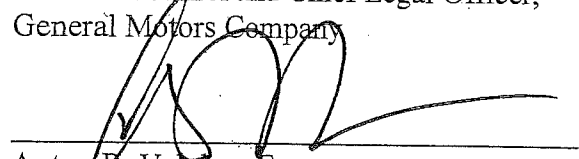
  
BONNIE JONAS  
SARAH EDDY MCCALLUM  
EDWARD A. IMPERATORE  
Assistant United States Attorneys

  
DANIEL L. STEIN  
Chief, Criminal Division

Accepted and agreed to:

  
Craig Glidden, Esq.

General Counsel and Chief Legal Officer,  
General Motors Company

  
Anton R. Valukas, Esq.  
Reid J. Schar, Esq.  
Anthony S. Barkow, Esq.

Attorneys for General Motors Company

# Exhibit A

## to the Deferred Prosecution Agreement



GENERAL MOTORS COMPANY  
RESOLUTIONS OF THE BOARD OF DIRECTORS

The following resolutions were duly adopted at a meeting of the Board of Directors of General Motors Company held on September 16, 2015:

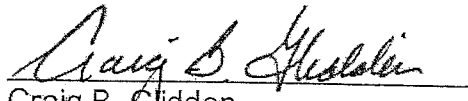
WHEREAS, the Company has been engaged in discussions with the U.S. Attorney's Office for the Southern District of New York (the "U.S. Attorney's Office") in connection with an investigation being conducted by the U.S. Attorney's Office of the Company's recalls of vehicles equipped with a defective ignition switch and related matters (the "Investigation"); and

WHEREAS, the Board has determined that it is in the best interest of the Company to enter into a Deferred Prosecution Agreement with the U.S. Attorney's Office that would resolve the Investigation on the terms that have been presented by and discussed with the U.S. Attorney's Office (the "DPA").

RESOLVED that the Board hereby authorizes the Company to resolve the Investigation by entering into the DPA on substantially the same terms set forth in materials provided to the Board in advance of the meeting and described to and reviewed with the Board on September 16, 2015;

RESOLVED that the Board hereby authorizes the Company to disclose the DPA, as appropriate, and the Authorized Officers (defined below) are hereby authorized to take all steps necessary to carry out the disclosure of the DPA; and

RESOLVED that the Board hereby authorizes Mr. Craig B. Glidden, General Counsel for the Company, and outside counsel representing the Company from Jenner & Block LLP, acting together, to execute and deliver the DPA on behalf of the Company and further authorizes them and other appropriate officers of the Company, any one of which acting alone (individually and collectively, the "Authorized Officers"), to take any and all other actions as may be necessary or appropriate to effectuate and finalize the DPA.

  
Craig B. Glidden  
General Counsel

# Exhibit B

## to the Deferred Prosecution Agreement

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

UNITED STATES OF AMERICA, : INFORMATION

-v.- :

GENERAL MOTORS COMPANY, : 15 Cr. —

Defendant. :

- - - - -x

COUNT ONE

(Scheme to Conceal Material Facts  
from a Government Regulator)

The United States Attorney charges:

1. GENERAL MOTORS COMPANY ("GM" or the "Company"),  
the defendant, is an automotive company headquartered in  
Detroit, Michigan. In 2012, GM was the largest automotive  
company in the world.

2. At all times relevant to this Information, GM  
designed, manufactured, assembled, and sold Chevrolet brand  
vehicles. From the earliest date relevant to this Information  
until in or about 2010, GM designed, manufactured, assembled,  
and sold Pontiac brand vehicles. From the earliest date  
relevant to this Information until in or about 2009, GM  
designed, manufactured, assembled, and sold Saturn brand  
vehicles. And from the earliest date relevant to this  
Information until in or about the spring of 2013, GM promoted

sales of "pre-owned" (i.e., used) Chevrolet, Pontiac, and Saturn brand vehicles by GM dealerships nationwide.

3. At all times relevant to this Information, GM was required to disclose to its U.S. regulator, the National Highway Traffic Safety Administration ("NHTSA"), any defect in its cars "related to motor vehicle safety" within five business days of identifying said defect. See 49 U.S.C. § 30118(c) & 49 C.F.R. § 573.6.

4. From in or about the spring of 2012 through in or about February 2014, GM, through its agents and employees, concealed a potentially deadly safety defect from NHTSA and the public. The defect related to an ignition switch that had been designed and manufactured with too-low torque (the "Defective Switch"). As GM knew by no later than 2005, the Defective Switch was prone to too-easy movement from the "Run" to the "Accessory" or "Off" position. And as GM personnel well knew no later than the spring of 2012, when that movement occurred, the driver would lose not only the assistance of power steering and power brakes but also the protection afforded by the vehicle's frontal airbags in the event of a crash.

5. Rather than remedy the Defective Switch when its torque deficiencies and attendant stalling consequences became clear no later than in or about 2005, GM continued to sell and manufacture new cars equipped with the Defective Switch.

Moreover, although the public was made aware, through media reports, of the Defective Switch's existence, GM affirmatively assured consumers in or about June 2005 that the Defective Switch presented no "safety" problem.

6. In or about April 2006, a GM engineer directed that the Defective Switch no longer be used in new cars, and that it be replaced with another, non-defective switch that would bear the same part number as the Defective Switch. Nothing was done at this time to remedy the cars equipped with the Defective Switch that were already on the road.

7. When the fact that the Defective Switch could cause airbag non-deployment -- and therefore undeniably presented a *safety* defect -- became plain no later than in or about the spring of 2012, GM did not correct its earlier assurance that the Defective Switch posed no "safety" concern. Nor did it recall the affected vehicles. Instead, it concealed the defect from NHTSA and the public, taking the matter "offline," outside the normal recall process, so that the Company could buy time to package, present, explain, and manage the issue. Fearing an adverse impact on the Company's business, GM engineers and executives wanted to have answers to all questions that NHTSA, the media, and consumers might pose about the defect before alerting the regulator and the public to it.

8. GM did not recall the vehicles equipped with the Defective Switch until February 2014. In the meantime, in or about October 2012 and again in or about November 2013, GM personnel gave presentations to NHTSA in which they touted the robustness of GM's internal recall process and gave the misleading impression that GM worked promptly and efficiently to resolve known safety defects, including, specifically, defects related to airbag non-deployment.

#### Statutory Allegations

9. From in or about the spring of 2012 through in or about February 2014, GM, the defendant, in a matter within the jurisdiction of the executive branch of the Government of the United States, willfully and knowingly did falsify, conceal, and cover up by trick, scheme, and device material facts, and made materially false, fictitious, and fraudulent statements and representations, to wit, GM engaged in a scheme to conceal from its federal U.S. regulator, NHTSA, a potentially deadly safety defect that GM was required to disclose within five business days of discovery thereof.

(Title 18, United States Code, Sections 1001 and 2.)

COUNT TWO  
(Wire Fraud)

The United States Attorney further charges:

10. The allegations contained in Paragraphs 1 through 8 are repeated and realleged as though fully set forth herein.

11. From in or about the spring of 2012 through in or about the spring of 2013, GM dealerships continued to sell GM-certified pre-owned Chevrolet, Pontiac, and Saturn brand vehicles equipped with the Defective Switch. To promote these sales and give customers assurance about the safety of the cars subject to its certified pre-owned program, GM made representations by means of interstate wires -- that is, over the Internet -- falsely assuring customers of the safety of the used cars they were purchasing. In particular, GM certified that used vehicles sold pursuant to this program had been checked for safety of their ignition systems and keys. In truth and in fact, and as GM well knew, cars equipped with the Defective Switch posed a potentially deadly safety threat related to the cars' ignition switches and keys.

12. In addition to making these false representations as part of its certified pre-owned program, GM, more generally, failed to disclose a material fact that it had a duty to disclose -- namely, that cars equipped with the Defective Switch presented a safety defect. GM's duty to disclose this fact

derived from two sources: (a) its false June 2005 representation that the Defective Switch presented no safety concern; and (b) its obligation under applicable regulations to inform NHTSA of any known safety defect within five business days of discovery thereof.

#### Statutory Allegation

13. From in or about the spring of 2012 through in or about February 2014, in the Southern District of New York and elsewhere, GM, the defendant, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted and aid and abet the transmission, by means of wire, radio, and television communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, to wit, GM defrauded U.S. consumers into purchasing its products by concealing information and making misleading statements about the safety of vehicles equipped with the Defective Switch.

(Title 18, United States Code, Sections 1343 and 2.)



FORFEITURE ALLEGATION

14. As a result of committing the wire fraud offense alleged in Count Two of this Information, GM, the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461, any property, real or personal, which constitutes or is derived from proceeds traceable to such offense.

Substitute Asset Provision

15. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

- (a) cannot be located upon the exercise of due diligence;
- (b) has been transferred or sold to, or deposited with, a third person;
- (c) has been placed beyond the jurisdiction of the Court;
- (d) has been substantially diminished in value; or
- (e) has been commingled with other property which cannot be subdivided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 982(b) and Title 21, United States Code, Section 853(p), to seek forfeiture of any

other property of said defendant up to the value of the  
above forfeitable property.

(Title 18, United States Code, Sections 981 and 982; Title 21  
United States Code, Section 853; and  
Title 28, United States Code, Section 2461.)

Preet Bharara  
PREET BHARARA  
United States Attorney

# Exhibit C

## to the Deferred

## Prosecution Agreement

## Statement of Facts

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### Overview

1. GENERAL MOTORS COMPANY (“GM” or the “Company”), which in 2012 was the largest automotive manufacturer in the world, is headquartered in Detroit, Michigan.<sup>1</sup>

2. At all times relevant to this Statement of Facts, GM designed, manufactured, assembled, and sold Chevrolet brand vehicles. From the earliest date relevant to this Statement of Facts until in or about 2010, GM designed, manufactured, assembled, and sold Pontiac brand vehicles. From the earliest date relevant to this Statement of Facts until in or about 2009, GM designed, manufactured, assembled, and sold Saturn brand vehicles. And from the earliest date relevant to this Statement of Facts until in or about the spring of 2013, GM promoted sales of “pre-owned” (*i.e.*, used) Chevrolet, Pontiac, and Saturn brand vehicles by GM dealerships nationwide.

3. As set forth in more detail below, from in or about the spring of 2012 through in or about February 2014, GM failed to disclose a deadly safety defect to its U.S. regulator, the National Highway Traffic Safety Administration (“NHTSA”). It also falsely represented to consumers that vehicles containing the defect posed no safety concern.

4. The defect at issue is a low-torque ignition switch installed in many of the vehicles identified below, which, under certain circumstances, may move out of the “Run” position (the “Defective Switch”). If this movement occurs, the driver loses the assistance of power steering and power brakes. And if a collision occurs while the switch is in the Accessory or Off position, the vehicle’s safety airbags may fail to deploy—increasing the risk of death and serious injury in certain types of crashes in which the airbag was otherwise designed to deploy. The model year cars which may have been equipped with the Defective Switch are the 2005, 2006, and 2007 Chevrolet Cobalt; the 2005, 2006, and 2007 Pontiac G5; the 2003, 2004, 2005, 2006, and 2007 Saturn Ion; the 2006 and 2007 Chevrolet HHR; the 2007 Saturn Sky; and the

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<sup>1</sup> For the purposes of this Statement of Facts, to the extent any conduct, statement, actions, or documents occurred on or are dated before July 10, 2009, references to “GM” shall mean and are intended to mean solely “Motors Liquidation Company,” previously known as General Motors Corporation (“Old GM”). Although New GM in this Statement of Facts admits certain facts about Old GM’s acts, conduct, or knowledge prior to July 10, 2009 based on New GM’s current knowledge, New GM does not intend those admissions to imply or suggest that New GM is responsible for any acts, conduct or knowledge of Old GM, or that such acts, conduct, and knowledge of Old GM can be imputed to New GM. This Statement of Facts is not intended to alter, modify, expand, or otherwise affect any provision of the July 5, 2009 Sale Order that was issued by the U.S. Bankruptcy Court for the Southern District of New York, or the rights, protections, and responsibilities of New GM under the Sale Order.

2006 and 2007 Pontiac Solstice. To date, GM has acknowledged a total of 15 deaths, as well as a number of serious injuries, that occurred in crashes in which the Defective Switch may have caused or contributed to frontal airbag non-deployment.

5. Before the Defective Switch went into production in 2002, certain GM engineers knew that it was prone to movement out of the Run position; testing of a prototype showed that the torque return between the Run and Accessory positions fell below GM's own internal specifications. But the engineer in charge of the Defective Switch approved its production anyway.

6. In or about 2004 and 2005, as GM employees, media representatives, and GM customers began to experience sudden stalls and engine shutoffs caused by the Defective Switch, GM considered fixing the problem. However, having decided that the switch did not pose a safety concern, and citing cost and other factors, engineers responsible for decision-making on the issue opted to leave the Defective Switch as it was and simply promulgate an advisory to dealerships with tips on how to minimize the risk of unexpected movement out of the Run position. GM even rejected a simple improvement to the head of the key that would have significantly reduced unexpected shutoffs at a price of less than a dollar a car. At the same time, in or about June 2005, GM issued a statement that acknowledged circumstances where the ignition key could inadvertently move to the Accessory or Off position when the car was running. In response to a further inquiry, GM informed a newspaper that GM did not believe the inadvertent rotation of the ignition key was a safety issue.

7. From approximately the spring of 2012, certain GM personnel knew that the Defective Switch presented a safety defect because it could cause airbag non-deployment associated with death and serious injury.

8. Yet not until approximately 20 months later, in February 2014, did GM first notify NHTSA and the public of the connection between the Defective Switch and fatal airbag non-deployment incidents. This announcement accompanied an initial recall of approximately 700,000 vehicles—a population that would, by March 2014, grow to more than 2 million.

9. Inside GM, certain personnel responsible for shepherding safety defects through GM's internal recall process delayed this recall until GM could fully package, present, explain, and handle the deadly problem, taking affirmative steps to keep the Defective Switch matter outside the normal process. On at least two occasions while the Defective Switch condition was well known by some within GM but not disclosed to the public or NHTSA, certain GM personnel made incomplete and therefore misleading presentations to NHTSA assuring the regulator that GM would and did act promptly, effectively, and in accordance with its formal recall policy to respond to safety problems—including airbag-related safety defects.

10. Moreover, for much of the period during which GM failed to disclose this safety defect, it not only failed to correct its June 2005 assurance that the Defective Switch posed no safety concern but also actively touted the reliability and safety of cars equipped with the Defective Switch, with a view to promoting sales of used GM cars. Although GM sold no *new* cars equipped with the Defective Switch during this period, GM dealers were still, from in or about the spring of 2012 through in or about the spring of 2013, selling pre-owned Chevrolet, Pontiac, and Saturn brand cars that would later become subject to the February 2014 recalls. These sales were accompanied by certifications from GM, assuring the unwitting consumers that the vehicles' components, including their ignition systems and keys, met all safety standards.

11. After the spring of 2012 but before the recall was announced, the fifteenth Company-acknowledged death associated with the Defective Switch occurred.

#### Regulatory Framework and GM's Formal Recall Process

12. Under regulations applicable to GM at all relevant times, the Company was required to disclose to NHTSA any "defect . . . related to motor vehicle safety." "Motor vehicle safety" was defined as "performance of a motor vehicle . . . in a way that protects the public against unreasonable risk of accidents . . . and against unreasonable risk of death or injury in an accident." 49 U.S.C. §§ 30118(c)(1); 30102(a)(8). Such disclosure had to be "submitted not more than 5 working days after a defect in a vehicle or item of equipment ha[d] been determined to be safety related." See 49 U.S.C. § 30118(c) and 49 C.F.R. § 573.6.<sup>2</sup>

13. The required disclosure was to be made by filing a "Defect Information Report" or "DIR." An auto manufacturer's filing of a DIR with NHTSA is commonly referred to as a "recall."

14. At all times relevant to this Statement of Facts, GM had a formal recall decision-making process, called the Field Performance Evaluation or "FPE" process, the steps of which were well documented. According to Company policy, the FPE process was supposed to be initiated by dedicated engineers in the Product Investigations ("PI") group. PI, which was at all relevant times headed by GM's Director of Safety & Crashworthiness or Director of Product Investigations, was responsible for identifying and investigating suspected safety and compliance problems with GM cars.

15. Once PI had completed its investigation of a suspected safety problem, it would, according to GM policy, hand the matter off from the engineering side of the house to the

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<sup>2</sup> Congress has adopted no criminal penalty for violating this regulatory disclosure requirement. Instead, in order for a company to be held criminally liable under federal law for even an egregious failure to report a known safety defect, its conduct must have independently violated some other federal law to which criminal penalties do attach.

“Quality” organization—specifically, to the “FPE Director.” This entailed presenting the problem at a weekly Investigation Status Review (“ISR”) meeting attended by the FPE Director, GM’s Director of Safety & Crashworthiness or Director of Product Investigations, and a member of GM’s legal department.

16. If, based on PI’s presentation at the ISR, these three individuals believed that the matter involved a potential safety defect, they were to advance it for consideration by the Field Performance Evaluation Team (“FPET”). The FPET had no recall decision-making authority but was tasked with gathering information needed to execute a potential recall.

17. At roughly the same time that the FPET was apprised of the issue, the matter was also supposed to go before the Field Performance Evaluation Review Committee (“FPERC”). The FPERC would make a preliminary decision about whether the issue under consideration qualified as a “defect . . . related to motor vehicle safety” under the applicable regulations and thus warranted a recall. It would then transmit its recommendation to the ultimate recall decision-making body, the Executive Field Action Decision Committee (“EFADC”). The EFADC was at all relevant times made up of three GM Vice Presidents.

18. Typically, the EFADC’s decision would have followed within approximately a week of the FPET’s and the FPERC’s consideration of the matter. If the EFADC voted for a recall, that decision would be reported to NHTSA within five business days, at which time a DIR would also be filed.

#### GM Equips Cars with a Defective Switch

19. In the early 2000s, GM launched a series of compact cars that it marketed as affordable, safe, and fuel-efficient—features particularly attractive to young, first-time car owners. One of these small cars was the Saturn Ion, first launched in 2002. Another was the Chevrolet Cobalt, launched in 2004. These two models belonged to GM’s “Delta” platform, and, from their respective launches until around late 2006, both were equipped with the same defective ignition switch (the Defective Switch). The Defective Switch would also be installed in other, less popular Chevrolet, Saturn, and Pontiac models from in or about 2004 through in or about late 2006.

20. Development of the switch that would end up first in the Ion and then in the Cobalt and other models began in the late 1990s. By March 2001, the GM design release engineer then in charge of the Ion’s switch (the “Switch DRE”) had finalized the applicable design specifications and communicated them to the supplier in charge of testing and manufacturing the component (the “Switch Supplier”). Among the specifications communicated to the Switch Supplier was that the torque necessary to move the switch from Run to Accessory must be no less than 15 Newton centimeters (“N-cm”) (the “Torque Specification”).



Mechanically, this torque performance was to be maintained by a detent plunger and spring within the switch.

21. Testing conducted by the Switch Supplier in 2001 and early 2002 revealed that an early version of the pre-production Defective Switch was not meeting the Torque Specification; it repeatedly scored "Not OK." A July 2001 pre-production report for the Ion within GM made the same observation: the switch had "low detent plunger force."

22. In email correspondence between the Switch DRE and the Switch Supplier in early 2002, the Switch Supplier confirmed that an early version of the Defective Switch was not meeting the Torque Specification and outlined the problems that might arise if the part were brought into compliance—including pressure on other switch components, delay, and increased costs. Saying that he was "tired of the switch from hell" and did not want to either compromise the electrical performance of the switch or slow the production schedule, the Switch DRE directed the Switch Supplier to "maintain present course" notwithstanding that there was "still too soft of a detent." Accordingly, the Defective Switch was put into production and installed into the first model year of the Ion (model year 2003), which was first sold to the public in 2002.

23. By email dated March 28, 2002, the Switch DRE recommended that the Defective Switch also be used in the Cobalt, which was to launch the next year. GM followed that recommendation.

24. Almost immediately, customers began to report problems with cars equipped with the Defective Switch. Meanwhile, GM employees tasked with driving early production versions of the Ion and then the Cobalt were reporting stalls while driving, and some of them were able to attribute the problem to the easy rotation of the key within the Defective Switch.

25. Members of the press covering the Cobalt's launch also experienced the unexpected shutoff problem. Alerted by one of the press reports, two executives in charge of safety at GM<sup>3</sup> determined to experience for themselves the complained-of phenomenon. In June 2005, they test drove a Cobalt and found that, as reported, the Cobalt could be easily keyed off by contact with the driver's knee.

26. Shortly afterward, GM issued a press statement acknowledging the problem as it pertained to the Cobalt, which had the greatest number of consumer complaints: "In rare cases when a combination of factors is present, a Chevrolet Cobalt driver can cut power to the engine by inadvertently bumping the ignition key to the accessory or off position while the car is running." The press release further recommended that drivers remove "nonessential material from their key rings." Before its public release, this statement was reviewed and approved by the

<sup>3</sup> The two executives were GM's then-Director of Vehicle Safety & Crashworthiness and the Senior Manager of the PI group (the "PI Senior Manager").



PI Senior Manager and by the senior GM attorney who advised engineers about safety- and recall-related issues (the "GM Safety Attorney"). In a response to further media inquiry, GM stated that it did not believe this condition presented a safety concern.

27. A June 2005 *Cleveland Plain Dealer* article reporting on the ignition switch problem marveled at GM's public statement, commenting "you have to admit it is pretty funny to hear somebody pretend that turning off the engine by mistake isn't a safety issue."

28. Just days before this article was published, GM engineers working on the Pontiac Solstice, another new car equipped with the Defective Switch, learned of a complaint about a Solstice that had experienced the same inadvertent shutoff problem as had been reported in the Ion and the Cobalt.

#### GM Considers a Fix

29. In November 2004, the Company opened the first of six engineering inquiries that would be initiated in the ensuing five years to consider ameliorative engineering changes for new cars being rolled off the production line. This first inquiry was closed "with no action" in March 2005. Fixes such as improving the torque performance of the Defective Switch itself and changing the head of the associated key to reduce the likelihood of inadvertent movement from Run to Accessory were rejected as not representing "an acceptable business case." Having decided that the switch did not pose a safety concern, GM engineers concluded that each proposed solution would take too long to implement, would cost too much, and would not fully fix "the possibility of the key being turned (ignition turn off) during driving."

30. Accordingly, GM decided to keep producing and selling new Cobalts, Ions, Solstices, Skys, G5s, and HHRs equipped with the Defective Switch.

31. Not all involved in the November 2004 engineering inquiry agreed with this outcome at the time. The Vehicle Performance Manager for the Cobalt believed that the Defective Switch presented a potential safety problem because it could cause sudden loss of power steering and power brakes. (This engineer did not have in mind at the time the loss of power to the airbag system.) He therefore thought a remedy should have been implemented without regard to cost concerns. His views did not prevail.

32. Meanwhile, in February 2005, while the November 2004 engineering inquiry was still open, the Company released a "Preliminary Information" to its dealers aimed at helping them diagnose and address the Defective Switch problem if a customer experienced it in a 2005 Cobalt or 2005 Pontiac Pursuit.<sup>4</sup> This publication explained that the Defective Switch's too-low "key ignition cylinder torque/effort" could cause "Engine Stalls" and "Loss of Electrical

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<sup>4</sup> The Ion was not covered by this Preliminary Information.

Systems.” It advised dealers to tell customers to remove non-essential items from their key chains. It offered no other fixes.

33. In May 2005, just two months after the November 2004 engineering inquiry into the Defective Switch was closed without action, a GM brand quality manager opened a second inquiry to consider fixing the problem for new cars. This manager cited a customer complaint that the “vehicle ignition will turn off while driving,” and noted that GM was having to buy back Cobalts as a result of the Defective Switch.

34. Still not believing this was a safety issue, GM engineers closed this inquiry too, without issuing a recall. Although GM engineers involved in the inquiry initially resolved to ameliorate the low torque problem for newly produced 2007 Cobalts by changing the design of the key head so that the key ring would sit in a “hole” rather than a “slot” (thus reducing the lever arm and attendant potential torque), they ultimately rejected this solution.

35. GM continued producing and selling new cars equipped with the Defective Switch and accompanying slot-head key.

36. Meanwhile, GM’s PI group, which was responsible for addressing problems with cars already on the road, began in the summer of 2005 to study the low torque issue. Like the engineering inquiries targeted at yet-to-be-manufactured cars, this investigation essentially went nowhere. Although PI engineers presented the matter to the ISR (the first stage of the potential recall process) in the summer of 2005, decision-makers who attended that ISR decided that the problem did not present a safety concern and thus did not warrant further consideration for recall. At the time, neither PI nor any member of the ISR seems to have appreciated that one of the electronic systems shut off by an inadvertent movement of the Defective Switch out of the Run position was the airbag system.

37. Having determined that the problem did not pose a safety concern and thus need not be considered further for recall, GM simply replaced the February 2005 Preliminary Information with a more formal “Service Bulletin” to its dealers (the “2005 Service Bulletin”), alerting them to an “inadvertent turning off” problem and instructing them to provide any complaining customers with inserts for their key heads that would transform the slot into a hole and thus reduce the lever arm. Unlike the Preliminary Information, which accurately described the condition caused by the Defective Switch as (among other things) a “stall,” the 2005 Service Bulletin omitted that word. Thus, a dealer responding to a customer inquiry or complaint would not locate the bulletin if he or she only used the word “stall” in the search.

38. The omission of the word “stall” from the 2005 Service Bulletin was deliberate. The PI Senior Manager, who oversaw and could control the wording of GM service bulletins, directed that the word be kept out of this bulletin even though he knew customers would naturally describe the problem as “stalling.” The reason for the omission was to avoid attracting

the attention of GM's regulator, NHTSA. As it had happened, in the interim between the February 2005 Preliminary Information and the 2005 Service Bulletin, some within GM had been meeting with representatives of NHTSA to try to persuade them that defects causing vehicles to stall were not necessarily safety defects warranting recall action. NHTSA agreed that stalls were not necessarily safety issues, but certain GM personnel were also aware of the regulator's sensitivity to stalling problems throughout this period.

39. Although the bulletin referenced not just the Cobalt but also the HHR, the Ion, the Solstice, and the Pursuit, and although it was updated in October 2006 to cover the model year 2007 versions of these cars and the 2007 Saturn Sky, the customers who would ultimately receive the bulletin's recommended key-head inserts between 2005 and 2014 numbered only about 430.

#### The Changes to the Switch and the Key

40. As of the spring of 2006, the 2005 Service Bulletin was the lone measure in place to address the Defective Switch. There were no systematic efforts to provide key modifications for all owners of affected cars—or even all owners who came into dealerships for service. And every day more and more new cars with the Defective Switch were being manufactured and sold to unwary customers.

41. In April 2006, that changed. The Switch DRE, who had received numerous complaints about the Defective Switch from other GM employees, authorized replacement of the Defective Switch in new cars with a different one that had a longer detent plunger and therefore significantly greater torque. The Switch DRE further directed, in contravention of accepted GM practice, that this change be implemented without a corresponding part number change. As a result, no one looking at the switch would be able, without taking it apart, to tell the difference between the old, Defective Switch and the new, non-defective one.

42. Although it was effectuated without a part number change, the switch change that the Switch DRE approved was documented internally, and other engineers were aware of it at the time and afterward. For example, a March 2007 note logged in connection with an engineering inquiry into another matter related to the Ion specifically observed that “[t]he detent plunger torque force was increased” by the Switch DRE in April 2006.

43. Another relevant change to the Cobalt was made in 2009. Having previously rejected the slot-to-hole alteration to the key head design, GM finally decided to implement that change. An engineer involved in the decision wrote at the time: “This issue has been around since man first lumbered out of [the] sea and stood on two feet.” The long-overdue change went into effect for the model year 2010 Cobalt.

The Defective Switch's Deadly Consequences<sup>5</sup>

44. As noted, the too-easy movement of the Defective Switch from the Run to the Accessory or Off position resulted in an unexpected shutoff of the engine and—as both the February 2005 Preliminary Information and the 2005 Service Bulletin properly described—a “loss of electrical system[s].” These electrical systems included power steering and power brakes. They also included the sensing diagnostic module or “SDM,” which controlled airbag deployment. Internal GM documents reflect that although the impact of an engine shutoff on the SDM was not on GM engineers’ minds, certain employees within GM understood no later than 2001 the natural connection between a loss of electrical systems and non-deployment of airbags: if the ignition switch turned to Off or Accessory, the SDM would “drop,” and the airbags would therefore be disabled. If a crash then ensued, neither the driver nor any passengers could have the protection of an airbag.

45. And, indeed, the deadly effects of the Defective Switch on airbag non-deployment began manifesting themselves early on, in crashes about which GM was made aware contemporaneously. In July 2004, the 37 year-old driver of a 2004 Ion, a mother of three children and two step-children, died in a crash after her airbags failed to deploy. A few months later, in November 2004, the passenger of a 2004 Ion died in another crash where the airbags failed to deploy. The driver was charged with, and ultimately pled guilty to, negligent homicide. Then, in June 2005, a 40-year-old man suffered serious injuries after his 2005 Ion crashed and the airbags failed to deploy.

46. For each of these Ion crashes in which the subject vehicles evidently lost power before impact, the SDM data recovered from the crashed vehicles was unilluminating. Unlike the SDM installed in the Cobalt, the Ion’s SDM was incapable of recording data—including power mode status—after the vehicle had lost power.

47. The Cobalt SDM data, by contrast, reflected a number of non-deployments accompanied by a power mode status recording of Accessory or Off.

48. In July 2005, just months after GM closed its first engineering inquiry into the Defective Switch, a 16-year-old driver died in Maryland when the airbags in her 2005 Cobalt failed to deploy. The power mode status recorded for that vehicle at the time of the crash was Accessory.

49. In October 2006, two more teenagers died, also in a 2005 Cobalt, in Wisconsin. The airbags in the vehicle failed to deploy when they should have, and the police officer who

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<sup>5</sup> GM has acknowledged 15 deaths occurring in crashes in which the Defective Switch may have caused or contributed to airbag non-deployment, not all of which are described herein. Many other deaths have been alleged to have been associated with the Defective Switch.

examined the crashed vehicle noted in a February 2007 report on the incident that the ignition switch “appeared to have been in the accessory position . . . preventing the airbags from deploying.” An April 2007 report about the same crash by Indiana University likewise posited that the airbags had failed to deploy because the key was in the Accessory position. This report even specifically referenced the October 2006 version of the 2005 Service Bulletin, which described the Defective Switch.

50. In the spring of 2007, NHTSA approached certain GM personnel to express concern about a high number of airbag non-deployment complaints in Cobalts and Ions, and to ask questions about the July 2005 Cobalt crash resulting in the death of the 16-year-old girl. Around this same time, and as a result of NHTSA’s inquiries, a GM field performance assessment engineer with expertise in airbags who worked principally with GM lawyers (the “Airbag FPA Engineer”) began, at the request of his supervisors, to track reports of crashes in Cobalts where the airbags failed to deploy. And, in May 2007, the PI group even placed the issue of Cobalt airbag non-deployment into the first stage of GM’s recall process, the ISR. But the PI group, under the supervision of the PI Senior Manager, conducted no follow-up at the time.

51. In September 2008, another crash, this one involving a 2006 Cobalt, killed two people. The airbags failed to deploy when they should have. GM sent the crashed car’s SDM to the Company’s SDM supplier for examination. In May 2009, the SDM supplier reported that the power mode status was at one point during the crash recorded as Off, and that this was one of two possible explanations for the failure of the airbags to deploy. This report was provided in writing, but also in person, at a meeting attended by several GM employees—including a member of the PI group, in-house counsel, and the Airbag FPA Engineer who had been tracking the Cobalt non-deploy incidents.

52. In April 2009, a 73-year-old grandmother and her 13-year-old granddaughter were killed in rural Pennsylvania in a crash when the ignition switch in the grandmother’s 2005 Cobalt slipped into the Accessory position, thereby disabling the frontal airbags and preventing their deployment. The grandmother and her 13-year-old granddaughter, who was in the front passenger seat, both died at the scene. A 12-month-old great grandson, the sole survivor, was paralyzed from the waist down. He was hospitalized for 33 days following the crash.

53. In December 2009, a 35-year-old Virginia woman crashed her 2005 Cobalt, sustaining serious head injuries and rib fractures (hereinafter, the “Virginia Crash”). The airbags failed to deploy, and, as the Airbag FPA Engineer noted, the power mode at the time of the crash was recorded as Accessory.

54. Two weeks later, a 25-year-old nursing student died in Tennessee following a head-on collision in her 2006 Cobalt (hereinafter, the “Tennessee Crash”). Again, the airbags failed to deploy when they should have, and the power mode status was recorded as Off at the time of the crash.



55. In March 2010, a 29 year-old woman was killed in Georgia after her 2005 Cobalt crashed (hereinafter, the “Georgia Crash”). Although there was no allegation that the frontal airbag should have deployed, there was an allegation that loss of power steering caused the crash. The SDM from the vehicle showed that the power mode status was recorded as Accessory at the time of the crash.

56. Notably, just nine days before the Georgia Crash, GM had conducted a safety recall for a power steering problem in the Cobalt unrelated to the Defective Switch, in which it acknowledged that loss of power steering, standing alone, constituted a “defect . . . relate[d] to motor vehicle safety” and thus warranted recall action. The Defective Switch, of course, caused more than just loss of power steering; it also caused loss of other electrical systems. This was known by many within GM by no later than 2004—even if they did not appreciate precisely what electrical system components were affected (*e.g.*, the airbag SDM). Yet at no time before February 2014 did GM announce a recall for cars associated with the Defective Switch.

GM Identifies the Connection Between the Ignition Switch and Airbag Non-Deployment and Initiates a Formal Investigation

57. Many of the deaths and serious injuries associated with airbag non-deployment discussed in the foregoing paragraphs became the subject of legal claims—formal and informal—against GM. Certain GM lawyers, aided by the Airbag FPA Engineer and others like him who assisted in evaluating causes of crashes, realized by no later than early 2011 that a number of these non-deployment cases involved some sort of “anomaly” in the ignition switch. Specifically, in connection with the Tennessee Crash, discussed above, a GM engineer explained to legal staff that when the ignition switch power mode status is in Off (as it was in that case), the SDM “powers down,” and the airbags fail to deploy. The engineer further opined that the “a crash sensing system ‘anomaly’” resulting in a power mode status of Off had indeed caused non-deployment in the Tennessee Crash case.

58. This crash sensing “anomaly” risked the prospect of punitive damages. Three months later, GM settled the Tennessee Crash case.

59. Just days before that settlement, a 15-year-old girl in South Carolina crashed her mother’s 2007 Cobalt and suffered significant injuries when the airbag did not deploy. The power mode status was recorded as Accessory at the time of the crash. GM engineers evaluating the crash theorized that, as in the case of the Tennessee Crash, the non-deployment here may have been caused by a crash sensing “anomaly” related to the ignition switch.

60. Meanwhile, the GM attorney principally responsible for airbag non-deployment claims (the “GM Airbag Attorney”), who had become familiar with a number of Cobalt non-deployment incidents, grew concerned that the “anomaly” identified in these cases was getting insufficient attention from the PI group, which was supposed to investigate and work toward

remediating safety problems with cars on the road. At the time, no one within GM had yet sourced the “anomaly” to the Defective Switch’s torque.

61. Certain members of the legal department took the unusual step of arranging a meeting with PI. The meeting, which took place on July 27, 2011, was attended not just by the PI Senior Manager, who ran the PI group on a day-to-day basis, but also by his boss, the GM Director of Product Investigations (the “GM Safety Director”). Also present were the Airbag FPA Engineer, the GM Airbag Attorney, and the GM Safety Attorney. In advance of the meeting, the PI Senior Manager wrote to a colleague that the Cobalt airbag non-deployment problem was “ugly” and would make for “a difficult investigation.”

62. At the July 27, 2011 meeting, the Airbag FPA Engineer showed photographs of three of the most serious non-deployment crashes he had seen involving Cobalts, including photographs of the Tennessee Crash, and specifically highlighted his observations that many of these Cobalt non-deployment crashes had occurred while the power mode was in Accessory or Off.

63. After the meeting, the PI Senior Manager assigned an investigator (the “PI Investigator”) to examine the matter.

GM Identifies the Defective Switch as the Likely Cause of Airbag Non-Deployment in  
2005-2007 Model Year Cobalts

64. One of the first steps the PI Investigator took, in or about August 2011, was to gather learning and materials from the Airbag FPA Engineer who had been tracking non-deployment incidents in Cobalts since 2007, and who had been involved in evaluating a number of crashes that were the subject of Cobalt non-deployment legal claims. The Airbag FPA Engineer explained to the PI Investigator that he had observed that in some of these cases the power mode was recorded as either Accessory or Off at the time of the subject crashes. The Airbag FPA Engineer further noted that the non-deployment problem appeared to be limited to 2005-2007 model years of the Cobalt and appeared not to affect model years 2008 and later.

65. By March 2012, more than six months after he had been assigned to the matter, the PI Investigator had done little to advance the investigation. The GM Airbag Attorney called another meeting with PI for March 15, 2012. Attendees at this meeting included the GM Safety Attorney, the GM Airbag Attorney, the GM Safety Director, the PI Investigator, the PI Senior Manager, and the Airbag FPA Engineer. During the meeting, the PI Investigator complained that he needed more support from GM’s electrical engineering group to investigate a potential electrical (as opposed to mechanical) explanation for the Accessory and Off power mode recordings in many of the subject crashes.

66. Two weeks later, the Airbag FPA Engineer, members of GM's electrical engineering group, and others travelled to an auto salvage yard to examine potential electric problems related to the ignition switch—to see whether, as the PI Investigator and others had posited, the Accessory and Off power mode status recordings within the SDMs of the subject vehicles were attributable to an electrical “bounce” in the ignition switch.

67. At the yard, one of the engineers noticed that the effort needed to turn the ignition switch of the 2006 Cobalt they were examining was low. The group immediately dispatched one of their members to retrieve fish scales from a local bait and tackle shop to measure the rotational force in this and other salvage yard Cobalts. A GM electrical engineer involved in the exercise (the “GM Electrical Engineer”) recorded the findings, noted the unusually low force needed to move the examined switches out of Run, searched and found records of customer complaints about the low torque issue, and located the 2005 Service Bulletin addressing the issue.

68. The next day, the GM Electrical Engineer reported to his own boss these findings and his view that a probable root cause of the non-deployment problem was the Defective Switch moving out of Run to Accessory or Off. And that same day, the boss reported all of this to the PI Senior Manager and to the GM Safety Attorney.

69. At around the same time, the plaintiffs in a lawsuit stemming from the Virginia Crash, referenced above, located the 2005 Service Bulletin and identified the Defective Switch described therein as the cause of non-deployment in the vehicle at issue in that case. The GM Airbag Attorney identified the 2005 Service Bulletin as potentially related to the Virginia Crash.

70. In an April 23, 2012 email responding to a query about an ignition switch turning too easily from Run to Off, the PI Senior Manager wrote to colleagues claiming—inexplicably—that he had “not heard of” complaints about low torque in the “Cobalt or other models” since 2005, when the first PI examination was conducted and closed with the issuance of the 2005 Service Bulletin. The PI Investigator, meanwhile, pressed electrical engineers to continue to look into other possible causes of non-deployment, beyond the low torque problem.

71. No one from PI ushered the matter into the first stage of the formal recall process, the ISR, at this time. This approach represented a stark contrast even to the way in which the Defective Switch itself had been handled in 2005. Back then, *before* the dangerous connection to airbag non-deployment had been drawn, PI had promptly introduced the matter into the ISR.

72. In May 2012, the GM Safety Attorney asked a GM Vice President to act as an “Executive Champion” in order to propel the matter forward. During the first meeting chaired by this Executive Champion, on May 15, 2012, the GM Electrical Engineer presented his view that the Defective Switch was the cause of non-deployment in the affected Cobalt models. Those in attendance included the GM Safety Attorney, the GM Safety Director, the PI Senior Manager,



the PI Investigator, and others. The Executive Champion encouraged confirmation of this hypothesis through more scientific study.

73. Days later, on May 22, 2012, such confirmation was obtained. The GM Electrical Engineer, the PI Investigator, and others traveled once more to an auto salvage yard and, using equipment much more sophisticated than fish scales, conducted a thorough study of torque in the ignition switches of several model years of Cobalt, Ion, and other cars. The results confirmed that the majority of vehicles from model years 2003 through 2007 exhibited torque performance below the Torque Specification that GM had adopted in 2001. They also showed that starting somewhere in model year 2007 (that is, for vehicles produced at some point in 2006), the torque values were higher and within specification.

74. The observed discrepancy was, of course, due to the ignition switch part change that the Switch DRE had ordered in April 2006. But neither anyone from PI nor others working on the airbag non-deployment investigation in the spring of 2012 knew yet about that change; the part number was the same for the Defective Switch and the new one. Indeed, when the PI Investigator asked the Switch DRE in early 2012 to detail any changes that might account for the discrepancy observed at the salvage yard, the Switch DRE denied any of relevance. This was baffling to the PI Investigator and others.

75. Still, the engineers involved knew that studied cars built before a certain point in 2006 were equipped with low-torque ignition switches, and that low torque in an ignition switch could result in airbag non-deployment. At this time, no further engineering tests were conducted to explore any other purported root cause of the observed non-deployment pattern or to compare the 2005 through 2007 model year Cobalt ignition switches with those of later model years.

76. On June 12, 2012, three weeks after the May 2012 salvage yard expedition, an expert retained by the Virginia Crash plaintiffs issued a report. Noting both the 2005 Service Bulletin and the Indiana University study from 2007 that had identified a connection between the Defective Switch and non-deployment of an airbag in a fatal Cobalt crash, the expert opined that the Defective Switch was indeed responsible for non-deployment in the Virginia Crash. In early July, outside counsel for GM forwarded the Virginia Crash expert's report to the GM Airbag Attorney. In late July, the GM Airbag Attorney forwarded the Indiana University study to the PI Senior Manager, the GM Safety Attorney, and the Airbag FPA Engineer.

77. At a meeting among GM lawyers in late July 2012 in which the Virginia Crash expert's report was discussed, a newly hired GM attorney asked the group why the Cobalt had not been recalled for the Defective Switch. Those present explained that the engineers had yet to devise a solution to the problem but that engineering was looking into it. The new attorney took from this that the GM legal department had done all it could do.

78. The PI Investigator, the PI Senior Manager, the GM Safety Attorney, the GM Safety Director, and others met at lengthy intervals through the summer and fall of 2012 and early 2013 to consider potential solutions and further explore why the defect condition appeared to be limited to earlier model years. As one of the several Executive Champions who would be tasked with overseeing these meetings from early 2012 through 2013 has explained, the purpose of the meetings was *not* to identify the root cause of the problem, which had by approximately the spring of 2012 been traced to the Defective Switch, but rather to develop the optimal remedy for the defect condition and set with precision the scope of the anticipated recall. Certain GM personnel wanted to be sure that the fix adopted for the problem would be affordable and yet appeal to consumers; that GM would have sufficient parts on hand to address the recall; and that GM representatives would be able to fully articulate to NHTSA and the public a “complete root cause” accounting for the discrepancy between the earlier and later vehicle populations.

GM's Representations to NHTSA About Its Recall Process

79. At the same time, the manner in which the responsible GM personnel were approaching the Defective Switch and its deadly consequences in 2012 contrasted with the picture the Company was presenting to NHTSA about its recall process.

80. On October 22, 2012, certain GM personnel, including the GM Safety Director, met with NHTSA officials in Washington, D.C., and gave a description of the Company's recall process intended to assure the regulator that safety issues were routinely addressed in a methodical and efficient fashion. The presentation, which touted a “common global process” with “standard work templates,” explained that the first step toward potential recall involved investigation by PI of the suspected safety problem. Then, according to the presentation, the matter would be placed promptly into the FPE process, which was controlled not by engineers but by personnel in charge of Quality. At this stage, GM further explained, the FPET would consider the logistics of implementing the proposed recall or other contemplated action; the FPERC would recommend the particular field action to be taken (recall or, for example, a customer advisory); and, in short order thereafter, the EFADC would either make the final decision concerning that recommended field action or order “further study.” According to individuals who attended this meeting and others in 2012 and 2013, GM gave the impression that its recall process was linear, robust, uniform, and prompt.

81. To the extent this presentation may have accurately described GM's general recall process and handling of other defects, it did not accurately describe GM's handling of the Defective Switch (about which NHTSA would remain unaware until 2014). By approximately

five months prior to this presentation, certain GM personnel had identified what they knew to be a dangerous safety defect and had not started it into the first phase of the recall process.<sup>6</sup>

GM Delays Recall After Learning of the 2006 Switch Change

82. By early 2013, the Defective Switch *still* had not been introduced into the FPE process. GM was exploring optimal remedies and trying to understand why the defect appeared to affect only a limited population. Those involved remained unaware of the part change that the Switch DRE had made back in April 2006—the change that explained why cars built after around late 2006 seemed not to be affected.

83. Meanwhile, during this same period, GM lawyers were engaged in heavy litigation related to the Georgia Crash, referenced above. The Georgia Crash plaintiffs' attorney had learned about the 2005 Service Bulletin, and had developed a theory that the Defective Switch caused the driver to lose control of her vehicle. The attorney was seeking discovery related to the bulletin and the Defective Switch more generally. He was also asking about any design changes that had been made to the switch.

84. GM denied that any such design changes had been made that would affect the amount of torque it takes to move the key from Run to Accessory.

85. Then, on April 29, 2013, the Georgia Crash plaintiffs' attorney took the deposition of the Switch DRE. During that deposition, the plaintiffs' attorney showed x-ray photographs of the ignition switch from the subject vehicle (the Defective Switch) and another switch from a later model year Cobalt (one installed after implementation of the Switch DRE's April 2006 part change directive). The photographs showed that the detent plunger in the Georgia Crash car was much shorter—and therefore would have had much lower torque performance—than the one in the later model year Cobalt. The Switch DRE, confronted with these photographs, continued to deny knowledge of any change to the switch that would have accounted for this difference.

86. But, as the Switch DRE has acknowledged, he knew almost immediately following his deposition that there had been a design change to the switch following production of the model year 2005 Cobalt, and that he must have been the engineer responsible for that design change. He knew as much because, the day after the April 29, 2013 deposition, he

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<sup>6</sup> As NHTSA and GM understood, GM's regulatory obligation to disclose safety defects within five days of their discovery was an obligation of the Company and not of any individual employee. Indeed, as NHTSA further understood, neither the GM Safety Director nor any other GM employee was authorized to disclose a safety defect to NHTSA without a decision from the EFADC that such a defect existed.

personally collected and took apart switches from a 2005 Cobalt and a later model year Cobalt and observed the difference in lengths of their respective detent plungers.

87. The Switch DRE has said that he recalls communicating these observations to his boss and to another supervisor and being advised to let the legal department handle the matter.

88. The GM Safety Attorney learned what transpired during the Switch DRE's deposition. Having previously received a request from the PI group for retention of an outside expert (the "Switch Expert") to help determine why the Defective Switch seemed to affect only a limited vehicle population, the GM Safety Attorney, on or about May 2, 2013, authorized retention of the Switch Expert in connection with the Georgia Crash case. The PI Investigator and the PI Senior Manager did not participate in meetings with the Switch Expert until the Switch Expert presented his conclusions following the settlement of the Georgia Crash case. The PI Investigator understood that he was to put his own investigation on hold pending the Switch Expert's evaluation.

89. Of course, by the time the Switch Expert had been retained, certain GM personnel had already learned from the Georgia Crash plaintiffs' attorney about the design change to the Defective Switch, and the Switch DRE had already confirmed that the change had in fact occurred. GM thus had an explanation for why the defect condition did not appear to affect cars built after the middle of 2006. And, indeed, some within GM had known for approximately a year that a confirmed population of GM's compact cars was equipped with the Defective Switch. Yet *still* there was no recall; indeed, still there was no move to even place the matter into the FPE process. Instead, GM personnel awaited the study and conclusions of the Switch Expert.

90. Meanwhile, on June 22, 2013, a 23-year-old man was killed in a crash on a highway near Roxton Pond, Quebec after his 2007 Cobalt left the road and ran into some trees. The driver-side airbag in the Cobalt failed to deploy. The power mode status was recorded as Accessory.

#### GM Receives Documentary Evidence of the Part Change and Finally Begins the Recall Process

91. By July 2013, the Switch Expert had confirmed what the Georgia Crash plaintiffs' expert and the Switch DRE had known since no later than April 2013: Cobalts from model years 2008 through 2010 had longer detent plungers and springs than those from model years 2005 and 2006. GM's outside counsel in the Georgia Crash case urged GM in-house lawyers to settle it: "[T]here is little doubt that a jury here will find that the ignition switch used on [the Georgia Crash car] was defective and unreasonably dangerous, and that it did not meet GM's own torque specifications. In addition, the [engineering inquiry documents about the Defective Switch from 2004 and 2005] and the on-going FPE investigation have enabled plaintiffs' counsel to develop a record from which he can compellingly argue that GM has known about this safety defect from the time the first 2005 Cobalts rolled off the assembly line and essentially has done nothing to



correct the problem for the last nine years.”

92. GM followed its outside counsel’s advice and settled the Georgia Crash case at the end of August 2013, agreeing to pay \$5 million.

93. Then, in late October 2013, GM received documentary confirmation from the Switch Supplier that the Switch DRE had in fact directed a part change to fix the Defective Switch in April 2006. This evidence further showed that the part was changed without a corresponding change to the part number.

94. Only at this point did GM finally place the Defective Switch matter into the formal FPE process. An ISR was scheduled for November 5, 2013. Meanwhile, on October 30, the PI Investigator, who was by now back working on the matter and helping to lay the practical groundwork for a recall, asked an employee in charge of ordering vehicle parts what the costs of new ignition switch components would be for the 2005 through 2007 Cobalts.

#### GM Makes Further Statements to NHTSA About Its Recall Process

95. On July 23, 2013, one day after GM’s outside counsel had advised GM to settle the Georgia Crash case and noted that plaintiffs’ counsel could make a “compelling” argument that GM “essentially has done nothing to correct” the Defective Switch “for the last nine years,” the GM Safety Director received an email from NHTSA’s Director of Defects Investigation accusing GM of being “slow to communicate” and “slow to act” in the face of safety defects—including defects unrelated to the Defective Switch (about which NHTSA remained unaware) but related to non-deployment of airbags.

96. Two days later, certain GM personnel, including the GM Safety Director, met with NHTSA to try to quell the agency’s concerns. According to notes taken by the GM Safety Director at that meeting, NHTSA agreed with GM that the Company appeared to have a “robust and rigorous process” for evaluating and addressing safety issues, but worried that it “tend[ed] to focus on proving the issue [wa]s not a safety defect.”

97. On November 7, 2013, two days after the ISR concerning the Defective Switch, certain GM personnel met again with NHTSA, this time to give a more in-depth presentation targeted at assuring the regulator that GM was “responsive” and “customer focused” when it came to safety concerns. Although the presentation did not specifically address the Defective Switch-related airbag non-deployment problem—which, having just entered the recall process within GM, remained unknown to NHTSA—it did address concerns related to airbag non-deployment more generally.

98. First, certain GM personnel showed NHTSA slides that touted the increasing swiftness with which GM had addressed safety defects from 2008 through 2012. One graph

reflected that the average time taken from identification of the issue through to execution of the recall was 160 days in 2008 and 84 days in 2012. It further showed that the average time an issue remained in the “pre-FPE” stage was 105 days in 2008 and 33 days in 2012. And the average number of days between entry into the FPE process and recall decision was 15 days in 2008 and 13 days in 2012.

99. Other portions of GM’s presentation suggested that any airbag defect that presented with a failure to warn the driver and/or certain other aggravating factors would be recalled swiftly.

#### GM Delays Recall for Three More Months

100. Although the Defective Switch matter entered the ISR on November 5, 2013, after approximately 804 days of formal investigation, and although GM had at the November 7 meeting with NHTSA touted an average lag of just 13 days between entry into the FPE process and recall approval by the EFADC, GM would not ultimately decide to conduct a recall for the Defective Switch until January 31, 2014. The recall was announced to NHTSA seven days later, on February 7, 2014.

101. The individual principally responsible for shepherding the matter through the FPE process was GM’s FPE Director, who worked closely with the GM Safety Director, the GM Safety Attorney, and a member of the EFADC responsible for deciding whether to recall.

102. As a general matter, EFADCs were scheduled weekly. The Defective Switch matter was initially contemplated for inclusion on the agenda of an EFADC scheduled for November 18. Citing the issue’s “complex[ity],” however, an assistant to the FPE Director recommended—and the FPE Director agreed—that the matter be put off until an EFADC scheduled for December 3.

103. The matter did not go to the EFADC on December 3, however. Instead, it was pushed to December 17. On December 2, the FPE Director met with the GM Safety Director, the PI Investigator, the GM Safety Attorney, and a few others in yet another “offline” meeting to discuss the matter. Then, on December 16, the issue was the subject of an FPERC meeting that had been scheduled to occur right before the December 17 EFADC meeting.

104. After that meeting, the FPE Director expressed concern about “execution details” of the recall. She explained to one of the three EFADC decision-makers that “[t]he absolute last thing we need to do from a customer perspective is to rush a decision, post it on the NHTSA website that [sic] we have a safety decision but we cannot fix the customer vehicles for some period of time.” The FPE Director informed this decision-maker that “we aren’t ready for a decision” because there were “[t]oo many items on how we know how the fix will perform and

the competitive solutions.” The decision-maker pledged to “push [to] do additional follow up on this prior to a decision.”

105. The EFADC meeting on December 17, 2013 yielded no decision, and further “study” was directed.

106. By this time, all involved understood—and some had for a period of time understood—that a Cobalt recall was inevitable.

107. Some within GM—including the GM Safety Director and the GM Safety Attorney—openly expressed concern about how the “timeline” of GM’s response to the Defective Switch would look to NHTSA. As noted, a manufacturer must, under applicable regulations, report a known safety defect to NHTSA within five business days of its discovery. Here, certain GM personnel knew by approximately the spring of 2012 that the Defective Switch posed a serious safety issue because it disabled airbags in situations when they should have deployed. Yet more than a year and a half after that discovery, GM still had not conducted a recall.

#### Recall

108. On January 31, the voting members agreed that a recall of the affected model year Cobalts, G5s, and Pursuits was warranted. On February 7, 2014, GM announced the recall to the public and NHTSA.

109. Although other models—the Ion, most notably—were likewise equipped with the Defective Switch, these were not recalled on February 7. The stated reasons for not including these other models varied. Some believed there were differences in electronic architecture and physical switch placement between the unrecalled cars and the recalled cars, such that the risk of switch movement and/or airbag non-deployment was reduced. Others cited an error by the PI Investigator in collecting incident data about the Ion, which they said gave the erroneous impression that there was no comparable problem with the Ion.

110. In any event, following intense criticism from the press about the limited scope of the February 7 recall, GM held another EFADC meeting on February 24, 2014 to consider the affected model years of the Ion, Sky, HHR, and Solstice. Voting members agreed that the February 7 recall should be expanded to encompass these other models. The next day, GM announced that decision.

#### GM’s Certifications for Pre-Owned Vehicles

111. All of the cars subject to the February and March 2014 airbag non-deployment recalls were relatively old. GM stopped manufacturing the Ion in 2006; stopped manufacturing

the Cobalt, the G5, the Sky, and the Solstice in 2009; and stopped manufacturing the HHR in 2010.

112. From in or about the spring of 2012, when certain GM personnel knew that the Defective Switch could cause airbag non-deployment, through at least in or about May of 2013, GM dealerships (which GM had not made aware of the issue) continued to sell “certified pre-owned” cars equipped with the Defective Switch. GM, which profited indirectly from these sales, certified the safety of the vehicles to the public, explaining that the certification process involved testing of over a hundred components, including, specifically, the ignition system.

113. But the safety certification was made despite there being no change or alteration to either the ignition switch itself or the accompanying key in these cars. The Defective Switch was left intact and unremedied.

114. Approximately 800 consumers purchased certified pre-owned vehicles equipped with the Defective Switch. The GM dealer certifications thus may have caused consumers who relied on the certifications to buy vehicles that they may incorrectly have believed to be safe.

#### Conclusion

115. As detailed above, starting no later than 2003, GM knowingly manufactured and sold several models of vehicles equipped with the Defective Switch. By approximately the spring of 2012, certain GM personnel knew that the Defective Switch could cause frontal airbag non-deployment in at least some model years of the Cobalt, and were aware of several fatal incidents and serious injuries that occurred as a result of accidents in which the Defective Switch may have caused or contributed to airbag non-deployment. This knowledge extended well above the ranks of investigating engineers to certain supervisors and attorneys at the Company—including GM’s Safety Director and the GM Safety Attorney. Yet, GM overshot the five-day regulatory reporting requirement for safety defects by approximately 20 months. And throughout this 20-month period, GM failed to correct its 2005 statement that the Defective Switch posed no “safety” problem.



# Exhibit D

## to the Deferred

## Prosecution Agreement

PREET BHARARA  
United States Attorney for the  
Southern District of New York  
By: JASON H. COWLEY  
ALEXANDER J. WILSON

Assistant United States Attorneys  
One St. Andrew's Plaza  
New York, New York 10007

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - -x

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	<u>VERIFIED COMPLAINT</u>
	:	
-v.-	:	15 Civ. _____
	:	
\$900,000,000 in United States	:	
Currency,	:	
	:	
Defendant <i>in rem</i> .	:	
- - - - -	:	

Plaintiff United States of America, by its attorney, PREET BHARARA, United States Attorney for the Southern District of New York, for its Verified Complaint (the "Complaint") alleges, upon information and belief, as follows:

I. JURISDICTION AND VENUE

1. This action is brought by the United States of America pursuant to 18 U.S.C. § 981(a)(1)(C), seeking the forfeiture of \$900,000,000 in United States Currency (the "Defendant Funds" or the "defendant-in-rem").

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1355.

3. Venue is proper pursuant to 28 U.S.C. § 1355(b)(1)(A) because certain acts and omissions giving rise to the forfeiture took place in the Southern District of New York, and pursuant to Title 28, United States Code, Section 1395 because the defendant-in-rem shall be transferred to the Southern District of New York.

4. The Defendant Funds represent property constituting and derived from proceeds of wire fraud in violation of Title 18, United States Code, Sections 1343, and property traceable to such property; and are thus subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(C).

## II. PROBABLE CAUSE FOR FORFEITURE

5. General Motors Company ("GM"), an automotive company headquartered in Detroit, Michigan, entered into a Deferred Prosecution Agreement with the United States, wherein, *inter alia*, GM agreed to forfeit a total of \$900,000,000, i.e., the Defendant Funds, to the United States. GM agrees that the Defendant Funds are substitute res for the proceeds of GM's wire fraud offense. The Deferred Prosecution Agreement, with the

accompanying Statement of Facts and Information, is attached as Exhibit A and incorporated herein.

### III. CLAIM FOR FORFEITURE

6. The allegations contained in paragraphs one through five of this Verified Complaint are incorporated by reference herein.

7. Title 18, United States Code, Section 981(a)(1)(C) subjects to forfeiture "[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting 'specified unlawful activity' (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense."

8. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7) to include any offense under 18 U.S.C. § 1961(1). Section 1961(1) lists, among others offenses, violations of Title 18, United States Code, Section 1343 (relating to wire fraud).

9. By reason of the foregoing, the defendant-in-rem is subject to forfeiture to the United States of America pursuant to Title 18, United States Code, Section 981(a)(1)(C), as it is substitute *res* for property derived from wire fraud, in violation of Title 18, United States Code, Section 1343.

WHEREFORE, plaintiff United States of America prays that process issue to enforce the forfeiture of the defendant-in-rem and that all persons having an interest in the defendant-in-rem be cited to appear and show cause why the forfeiture should not be decreed, and that this Court decree forfeiture of the defendant-in-rem to the United States of America for disposition according to law, and that this Court grant plaintiff such further relief as this Court may deem just and proper, together with the costs and disbursements of this action.

Dated: New York, New York  
September 16, 2015

PREET BHARARA  
United States Attorney for  
Plaintiff United States of America

By: 

JASON H. COWLEY  
ALEXANDER J. WILSON  
Assistant United States Attorneys  
One St. Andrew's Plaza  
New York, New York 10007  
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VERIFICATION

STATE OF NEW YORK )  
COUNTY OF NEW YORK :  
SOUTHERN DISTRICT OF NEW YORK )

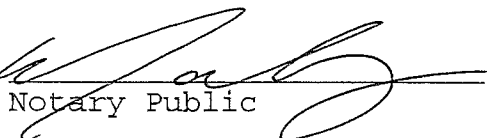
KENNETH W. JACOUTOT, being duly sworn, deposes and says that he is a Special Agent with the United States Department of Transportation, Office of Inspector General; that he has read the foregoing Verified Complaint and knows the contents thereof; and that the same is true to the best of his knowledge, information and belief.

The sources of deponent's information and the grounds of his belief are his personal involvement in the investigation, and conversations with and documents prepared by law enforcement officers and others.



Kenneth W. Jacoutot  
Special Agent  
Department of Transportation,  
Office of Inspector General

Sworn to before me this  
16 th day of September, 2015



Notary Public

# Exhibit 2

**COPY**

**THOMAS C. HORNE**

**Attorney General**

Firm State Bar No. 14000

BRAD K. KEOGH (SBA #010321)

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NOV 19 2014



MICHAEL K. JEANES, CLERK  
C. CARABAJAL  
DEPUTY CLERK

[Additional Counsel on Signature Page]

*Attorneys for Plaintiff  
State of Arizona*

**THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MARICOPA**

STATE OF ARIZONA, *ex rel.* THOMAS C.  
HORNE, Attorney General,

Plaintiff,

vs.

GENERAL MOTORS LLC,

Defendant.

Case No. CV2014-014090

**COMPLAINT FOR INJUNCTIVE  
AND OTHER RELIEF**

(Non-classified Civil; Consumer Fraud)



the New GM brand that no rational consumer would pay what otherwise would have been fair market value for their GM-branded vehicles purchased on or after July 11, 2009.

#### **IV. CLAIM FOR RELIEF**

##### **ARIZONA CONSUMER FRAUD ACT (A.R.S. § 44-1521, et seq.)**

494. The State realleges and incorporates by reference all paragraphs as though fully set forth herein.

495. New GM is a “person” within the meaning of A.R.S. § 44-1521(6).

496. GM-branded vehicles sold or leased on or after July 11, 2009 are “merchandise” within the meaning of A.R.S. § 44-1521(5).

497. The Arizona Consumer Fraud Act provides that “[t]he act, use or employment by any person of any deception, deceptive or unfair act or practice, fraud, false pretense, false promise, misrepresentation, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice.” A.R.S. § 44-1522(A).

498. In the course of its business, New GM systematically devalued safety and concealed a plethora of defects in GM-branded vehicles as described herein and otherwise engaged in activities with a tendency or capacity to deceive. New GM also engaged in unlawful practices by employing deception, deceptive or unfair acts or practices, fraud, false pretenses, false promises, misrepresentations, or concealment, suppression or omission of material facts with intent that others rely upon such concealment, suppression or omission, in connection with the sale and lease of GM-branded vehicles on or after July 11, 2009.

499. From the date of its inception on July 11, 2009, New GM knew of many serious defects affecting many models and years of GM-branded vehicles, both because of the

knowledge of Old GM personnel who remained at New GM, and continuous reports, investigations, and notifications from regulatory authorities. New GM became aware of other serious defects and systemic safety issues years ago, but concealed all of that information until recently.

500. New GM was also aware that it valued cost-cutting over safety, selected parts from the cheapest supplier regardless of quality, and actively discouraged employees from finding and flagging known safety defects, and that this approach would necessarily cause the existence of more defects in the vehicles it designed and manufactured and the failure to promptly disclose and remedy defects in all GM-branded vehicles. New GM concealed this information as well.

501. By failing to disclose and by actively concealing the many defects in GM-branded vehicles, by marketing its vehicles as safe, reliable, and of high quality, and by presenting itself as a reputable manufacturer that valued safety and stood behind its vehicles after they were sold, New GM engaged in deceptive and unlawful business practices in violation of the Arizona Consumer Fraud Act.

502. In the course of New GM's business, it willfully failed to disclose and actively concealed the dangerous risk posed by the many safety issues and serious defects discussed above. New GM compounded the deception by repeatedly asserting that its vehicles were safe, reliable, and of high quality, and by claiming to be a reputable manufacturer that valued safety and stood behind its vehicles once they are on the road.

503. New GM's unlawful, unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Arizona consumers, about the true safety and reliability of GM-branded vehicles, the quality of the New GM brand, the devaluing of safety at New GM, and the true value of GM-branded vehicles sold or leased on or after July 11, 2009.

504. New GM intentionally and knowingly misrepresented material facts regarding GM-branded vehicles with an intent to mislead Arizona consumers.

505. New GM knew or should have known that its conduct was of the nature prohibited by and violative of the Arizona Consumer Fraud Act.

506. As alleged above, New GM made material statements about the safety and reliability of GM-branded vehicles that were either false or misleading.

507. New GM owed purchasers of New GM vehicles a duty to disclose the true safety and reliability of GM-branded vehicles and the devaluing of safety at New GM, because New GM:

- a. Possessed exclusive knowledge that it valued cost-cutting over safety, selected parts from the cheapest supplier regardless of quality, and actively discouraged employees from finding and flagging known safety defects, and that this approach would necessarily cause the existence of more defects in the vehicles it designed and manufactured;
- b. Intentionally concealed the foregoing from the public, including Arizona residents; and/or
- c. Made incomplete representations about the safety and reliability of GM-branded vehicles generally, and the ignition switch in particular, while purposefully withholding material facts from the public, including Arizona residents, that contradicted these representations.

508. Because New GM fraudulently concealed the many defects in GM-branded vehicles, resulting in a raft of negative publicity once the defects finally began to be disclosed, the value of GM-branded vehicles sold on or after July 11, 2009, has greatly diminished. In light of the stigma attached to those vehicles by New GM's conduct, they are now worth significantly less than they otherwise would be.

509. New GM's systemic devaluation of safety and its concealment of a plethora of defects in GM-branded vehicles were material to Arizona residents. A vehicle made by a

reputable manufacturer of safe vehicles is worth more than an otherwise comparable vehicle made by a disreputable manufacturer of unsafe vehicles that conceals defects rather than promptly remedies them.

510. New GM's violations present a continuing risk to owners of GM-branded vehicles, as well as to the general public. New GM's unlawful acts and practices complained of herein affect the public interest.

511. While engaging in the unlawful acts and practices alleged in this Complaint, New GM was at all times acting willfully as defined by A.R.S. § 44-1531.

DATED: Novemer 19, 2014

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# Exhibit 3

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**THE PEOPLE OF THE STATE OF CALIFORNIA**

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**IN AND FOR THE COUNTY OF ORANGE – COMPLEX LITIGATION DIVISION**

THE PEOPLE OF THE STATE OF  
CALIFORNIA, acting by and through Orange  
County District Attorney Tony Rackauckas,

Plaintiff,

v.

GENERAL MOTORS LLC

Defendant.

Case No. 30-2014-00731038-CU-BT-CXC

**FIRST AMENDED COMPLAINT FOR  
VIOLATIONS OF CALIFORNIA  
UNFAIR COMPETITION LAW AND  
FALSE ADVERTISING LAW**

1 vehicles have been supplied in accordance with a previous representation when they have not; and  
2 (5) selling Defective Vehicles in violation of the TREAD Act.

## 3 **VI. CAUSES OF ACTION**

### 4 **FIRST CAUSE OF ACTION**

#### 5 **VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17200**

6 253. Plaintiff realleges and incorporates by reference all preceding paragraphs.

7 254. GM has engaged in, and continues to engage in, acts or practices that constitute  
8 unfair competition, as that term is defined in section 17200 of the California Business and  
9 Professions Code.

10 255. GM has violated, and continues to violate, Business and Professions Code section  
11 17200 through its unlawful, unfair, fraudulent, and/or deceptive business acts and/or practices.  
12 GM uniformly concealed, failed to disclose, and omitted important safety-related material  
13 information that was known only to GM and that could not reasonably have been discovered by  
14 California consumers. Based on GM's concealment, half-truths, and omissions, California  
15 consumers agreed to purchase or lease one or more (i) new or used GM vehicles sold on or after  
16 July 10, 2009; (ii) "GM certified" Defective Vehicles sold on or after July 10, 2009; (iii) and/or to  
17 have their vehicles repaired using GM's defective ignition switches. GM also repeatedly and  
18 knowingly made untrue and misleading statements in California regarding the purported reliability  
19 and safety of its vehicles, and the importance of safety to the Company. The true information  
20 about the many serious defects in GM-branded vehicles, and GM's disdain for safety, was known  
21 only to GM and could not reasonably have been discovered by California consumers.

22 256. As a direct and proximate result of GM's concealment and failure to disclose the  
23 many defects and the Company's institutionalized devaluation of safety, GM intended that  
24 consumers would be misled into believing that that GM was a reputable manufacturer of reliable  
25 and safe vehicles when in fact GM was an irresponsible manufacture of unsafe, unreliable and  
26 often dangerously defective vehicles.



**UNLAWFUL**

257. The unlawful acts and practices of GM alleged above constitute unlawful business acts and/or practices within the meaning of California Business and Professions Code section 17200. GM's unlawful business acts and/or practices as alleged herein have violated numerous federal, state, statutory, and/or common laws – and said predicate acts are therefore per se violations of section 17200. These predicate unlawful business acts and/or practices include, but are not limited to, the following: California Business and Professions Code section 17500 (False Advertising), California Civil Code section 1572 (Actual Fraud – Omissions), California Civil Code section 1573 (Constructive Fraud by Omission), California Civil Code section 1710 (Deceit), California Civil Code section 1770 (the Consumers Legal Remedies Act – Deceptive Practices), California Civil Code section 1793.2 *et seq.* (the Consumer Warranties Act), and other California statutory and common law; the National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101 *et. seq.*), as amended by the Transportation Recall Enhancement, Accountability and Documentation TREAD Act, (49 U.S.C. §§ 30101-30170) including, but not limited to 49 U.S.C. §§ 30112, 30115, 30118 and 30166, Federal Motor Vehicle Safety Standard 124 (49 C.F.R. § 571.124), and 49 CFR §§ 573.6, 579.11, 579.12, and 579.21.

**UNFAIR**

258. GM's concealment, omissions, and misconduct as alleged in this action constitute negligence and other tortious conduct and gave GM an unfair competitive advantage over its competitors who did not engage in such practices. Said misconduct, as alleged herein, also violated established law and/or public policies which seek to promote prompt disclosure of important safety-related information. Concealing and failing to disclose the nature and extent of the numerous safety defects to California consumers, before (on or after July 10, 2009) those consumers (i) purchased one or more GM vehicles; (ii) purchased used "GM certified" Defective Vehicles; or (iii) had their vehicles repaired with defective ignition switches, as alleged herein, was and is directly contrary to established legislative goals and policies promoting safety and the prompt disclosure of such defects, prior to purchase. Therefore GM's acts and/or practices alleged herein were and are unfair within the meaning of Business and Professions Code section 17200.



264. California consumers have been, and continue to be, deceived by GM's concealment and material omissions as alleged herein. California consumers have suffered injury and lost money as a direct result of the deceptive conduct as alleged herein. The unlawful, unfair, deceptive, and/or fraudulent business acts and practices of GM, as fully described herein, present a continuing threat to the citizens of California to be misled and/or deceived by GM as alleged herein, and/or to be substantially injured by these dangerously defective cars.

## **SECOND CAUSE OF ACTION**

### **VIOLATION OF BUSINESS AND PROFESSIONS CODE SECTION 17500**

265. Plaintiff realleges and incorporates by reference all preceding paragraphs.

266. California Business and Professions Code § 17500 states: "It is unlawful for any ... corporation ... with intent directly or indirectly to dispose of real or personal property ... to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated ... from this state before the public in any state, in any newspaper or other publication, or any advertising device, ... or in any other manner or means whatever, including over the Internet, any statement ... which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading."

267. GM caused to be made or disseminated through California and the United States, through advertising, marketing, and other publications, statements that were untrue or misleading, and which were known, or which by the exercise of reasonable care should have been known to GM, to be untrue and misleading to consumers.

268. GM has violated section 17500 because the misrepresentations and omissions regarding the safety and reliability of its vehicles and the importance of safety to the Company as set forth in this First Amended Complaint were material and likely to deceive a reasonable consumer.

269. California consumers were exposed to and saw advertisements for GM vehicles on television, in magazines, on billboards, in brochures at dealerships, and on the Internet before purchasing GM vehicles. Had those advertisements, window stickers, or any other materials disclosed that millions of GM-branded vehicles contained serious safety defects and that GM did

1 not value safety, consumers would not have purchased new GM vehicles on or after July 10, 2009  
2 and would not have purchased “GM certified” Defective Vehicles on or after July 10, 2009.

3 270. Despite notice of the serious safety defects in so many its vehicles, GM did not  
4 disclose to consumers that its vehicles – which GM for years had advertised as “safe” and  
5 “reliable” – were in fact not as safe or reliable as a reasonable consumer expected due to the risks  
6 created by the many known defects, and GM’s focus on cost-cutting at the expense of safety and  
7 the resultant concealment of numerous safety defects. GM never disclosed what it knew about the  
8 defects. Rather than disclose the truth, GM concealed the existence of the defects, and claimed to  
9 be a reputable manufacturer of safe and reliable vehicles.

10 271. GM, by the acts and misconduct alleged herein, violated Business & Professions  
11 Code section 17500, and GM has engaged in, and continues to engage in, acts or practices that  
12 constitute false advertising.

13 272. GM has violated, and continues to violate, Business and Professions Code section  
14 17500 by disseminating untrue and misleading statements as defined by Business and Professions  
15 Code 17500. GM has engaged in acts and practices with intent to induce members of the public to  
16 purchase its vehicles by publicly disseminated advertising which contained statements which were  
17 untrue or misleading, and which GM knew, or in the exercise of reasonable care should have  
18 known, were untrue or misleading, and which concerned the real or personal property or services  
19 or their disposition or performance.

20 273. GM repeatedly and knowingly made untrue and misleading statements in California  
21 regarding the purported reliability and safety of its vehicles. The true information was known only  
22 to GM and could not reasonably have been discovered by California consumers. GM uniformly  
23 concealed, failed to disclose and omitted important safety-related material information that was  
24 known only to GM and that could not reasonably have been discovered by California consumers.  
25 Based on GM’s concealment, half-truths, and omissions, California consumers agreed (on or after  
26 July 10, 2009) (i) to purchase GM vehicles; (ii) to purchase used “GM certified” Defective  
27 Vehicles; and/or (iii) to have their vehicles repaired using defective ignition switches,  
28

274. As a direct and proximate result of GM's concealment and failure to disclose the many safety defects, GM intended that consumers would be misled into believing that they would be purchasing a safe and reliable vehicle built by a reputable manufacturer that values safety, when in fact they were purchasing vehicles that were in many cases dangerously defective and were in every case overpriced because they were in fact built by an irresponsible manufacturer that valued cost-cutting over safety and routinely concealed a myriad of serious defects from regulators and the public.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff prays for judgment against GM as follows:

A. Pursuant to Business and Professions Code sections 17203 and 17535, that GM, its employees, agents, representatives, successors, assigns, and all persons who act in concert with them be permanently enjoined from committing any acts of unfair competition, including the violations alleged herein.

B. Pursuant to Business and Professions Code sections 17206 and 17536, that GM be ordered to pay a civil penalty in the amount of Two Thousand Five Hundred dollars (\$2,500.00) for each violation of Business and Professions Code section 17200 and for Five Thousand dollars (\$5,000) for each violation of Business and Professions Code section 17500 by GM in an amount according to proof.

C. That Plaintiff recover its costs of suit, including costs of investigation.

D. For reasonable attorneys' fees pursuant to Code of Civil Procedure section 1021.5, or other applicable law; and

E. For such other equitable relief as is just and proper.

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///

///

1 Dated: July 1, 2014

Respectfully submitted,

2 TONY RACKAUCKAS, DISTRICT ATTORNEY  
3 COUNTY OF ORANGE, STATE OF CALIFORNIA

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**THE PEOPLE OF THE STATE OF CALIFORNIA**

# Exhibit 4



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
IN RE:

14-MD-2543 (JMF)

GENERAL MOTORS LLC IGNITION  
SWITCH LITIGATION

**[CORRECTED] SECOND AMENDED  
CONSOLIDATED COMPLAINT**

*This Document Relates to All Actions*

[REDACTED]

-----X



which New GM had unjustly and unlawfully determined not to recall, New GM benefitted by avoiding the costs of a recall and other lawsuits, and further benefitted from its statements about the success of New GM.

1461. Thus, all Arkansas Unjust Enrichment Class Members conferred a benefit on New GM.

1462. It is inequitable for New GM to retain these benefits.

1463. Plaintiffs were not aware about the true facts about GM-branded vehicles, and did not benefit from GM's conduct.

1464. New GM knowingly accepted the benefits of its unjust conduct.

1465. As a result of New GM's conduct, the amount of its unjust enrichment should be disgorged, in an amount according to proof.

## **CALIFORNIA**

### **COUNT I**

#### **VIOLATIONS OF THE CONSUMER LEGAL REMEDIES ACT**

##### **(CAL. CIV. CODE § 1750, *et seq.*)**

1466. Plaintiffs reallege and incorporate by reference all paragraphs as though fully set forth herein.

1467. This claim is brought only on behalf of Nationwide Class Members who are California residents.

1468. New GM is a "person" under CAL. CIV. CODE § 1761(c).

1469. Plaintiffs and the California Class are "consumers," as defined by CAL. CIVIL CODE § 1761(d), who purchased or leased one or more Affected Vehicles.

1470. The California Legal Remedies Act ("CLRA") prohibits "unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the

sale or lease of goods or services to any consumer[.]” CAL. CIV. CODE § 1770(a). New GM has engaged in unfair or deceptive acts or practices that violated CAL. CIV. CODE § 1750, *et seq.*, as described above and below, by among other things, representing that Affected Vehicles have characteristics, uses, benefits, and qualities which they do not have; representing that Affected Vehicles are of a particular standard, quality, and grade when they are not; advertising Affected Vehicles with the intent not to sell or lease them as advertised; and representing that the subject of a transaction involving Affected Vehicles has been supplied in accordance with a previous representation when it has not.

1471. In the course of its business, New GM systematically devalued safety and concealed a plethora of defects in GM-branded vehicles as described herein and otherwise engaged in activities with a tendency or capacity to deceive. New GM also engaged in unlawful trade practices by employing deception, deceptive acts or practices, fraud, misrepresentations, or concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of Affected Vehicles.

1472. From the date of its inception on July 11, 2009, New GM knew of many serious defects affecting many models and years of GM-branded vehicles, because of (i) the knowledge of Old GM personnel who remained at New GM; (ii) continuous reports, investigations, and notifications from regulatory authorities; and (iii) ongoing performance of New GM’s TREAD Act obligations, as discussed above. New GM became aware of other serious defects and systemic safety issues years ago, but concealed all of that information until recently.

1473. New GM was also aware that it valued cost-cutting over safety, selected parts from the cheapest supplier regardless of quality, and actively discouraged employees from finding and flagging known safety defects, and that this approach would necessarily cause the

existence of more defects in the vehicles it designed and manufactured and the failure to disclose and remedy defects in all GM-branded vehicles. New GM concealed this information as well.

1474. According to one report from the Center for Auto Safety, some 2,004 deaths and injuries are connected with recently recalled GM-branded vehicles, and New GM should have recalled the vehicles years ago.

1475. By failing to disclose and by actively concealing the many defects in GM-branded vehicles, by marketing its vehicles as safe, reliable, and of high quality, and by presenting itself as a reputable manufacturer that valued safety and stood behind its vehicles after they were sold, New GM engaged in unfair and deceptive business practices in violation of the CLRA.

1476. In the course of New GM's business, it willfully failed to disclose and actively concealed the dangerous risk posed by the many safety issues and serious defects discussed above. New GM compounded the deception by repeatedly asserting that GM-branded vehicles were safe, reliable, and of high quality, and by claiming to be a reputable manufacturer that valued safety and stood behind its vehicles once they are on the road.

1477. New GM's unfair or deceptive acts or practices were likely to and did in fact deceive reasonable consumers, including Plaintiffs, about the true safety and reliability of GM-branded vehicles, the quality of the GM brand, the devaluing of safety at New GM, and the true value of the Affected Vehicles.

1478. New GM intentionally and knowingly misrepresented material facts regarding the Affected Vehicles with an intent to mislead Plaintiffs and the California Class.

1479. New GM knew or should have known that its conduct violated the CLRA.

1480. As alleged above, New GM made material statements about the safety and reliability of the Affected Vehicles and the GM brand that were either false or misleading.

1481. New GM owed Plaintiffs a duty to disclose the true safety and reliability of the Affected Vehicles and the devaluing of safety at New GM, because New GM:

- a. Possessed exclusive knowledge that it valued cost-cutting over safety, selected parts from the cheapest supplier regardless of quality, and actively discouraged employees from finding and flagging known safety defects, and that this approach would necessarily cause the existence of more defects in the vehicles it designed and manufactured;
- b. Intentionally concealed the foregoing from Plaintiffs; and/or
- c. Made incomplete representations about the safety and reliability of the Affected Vehicles generally, and the ignition switch and other defects in particular, while purposefully withholding material facts from Plaintiffs that contradicted these representations.

1482. Because New GM fraudulently concealed the many defects in GM-branded vehicles, resulting in a raft of negative publicity once the defects finally began to be disclosed, the value of the Affected Vehicles has greatly diminished. In light of the stigma attached to those vehicles by New GM's conduct, they are now worth significantly less than they otherwise would be.

1483. New GM's systemic devaluation of safety and its concealment of a plethora of defects in GM-branded vehicles were material to Plaintiffs and the California Class. A vehicle made by a reputable manufacturer of safe vehicles is safer and worth more than an otherwise comparable vehicle made by a disreputable manufacturer of unsafe vehicles that conceals defects rather than promptly remedies them.

1484. Plaintiffs and the California Class suffered ascertainable loss caused by New GM's misrepresentations and its concealment of and failure to disclose material information. Plaintiffs who purchased GM-branded vehicles after the date of New GM's inception either would have paid less for their vehicles or would not have purchased or leased

them at all. For Plaintiffs who purchased Old GM Defective Ignition Switch Vehicles that were sold as “Certified Pre-Owned,” they too either would have paid less for their vehicles or would not have purchased them but for New GM’s violations of the CLRA.

1485. Regardless of time of purchase or lease, no Plaintiffs would have maintained and continued to drive their vehicles had they been aware of New GM’s misconduct. By contractually assuming TREAD Act responsibilities with respect to Old GM vehicles, New GM effectively assumed the role of manufacturer of those vehicles because the TREAD Act on its face only applies to vehicle manufacturers. 49 U.S.C. § 30118(c). New GM had an ongoing duty to all GM vehicle owners to refrain from unfair and deceptive acts or practices under the CLRA. And, in any event, all GM vehicle owners suffered ascertainable loss of the diminished value of their vehicles as a result of New GM’s deceptive and unfair acts and practices made in the course of New GM’s business.

1486. New GM’s violations present a continuing risk to Plaintiffs as well as to the general public. New GM’s unlawful acts and practices complained of herein affect the public interest.

1487. As a direct and proximate result of New GM’s violations of the CLRA, Plaintiffs and the California Class have suffered injury-in-fact and/or actual damage.

1488. Under CAL. CIV. CODE § 1780(a), Plaintiffs and the California Class seek monetary relief against New GM measured as the diminution of the value of their vehicles caused by New GM’s violations of the CLRA as alleged herein.

1489. Under CAL. CIV. CODE § 1780(b), Plaintiffs seek an additional award against New GM of up to \$5,000 for each California Class member who qualifies as a “senior citizen” or “disabled person” under the CLRA. New GM knew or should have known that its conduct was

directed to one or more California Class Members who are senior citizens or disabled persons. New GM's conduct caused one or more of these senior citizens or disabled persons to suffer a substantial loss of property set aside for retirement or for personal or family care and maintenance, or assets essential to the health or welfare of the senior citizen or disabled person. One or more California Class Members who are senior citizens or disabled persons are substantially more vulnerable to New GM's conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and each of them suffered substantial physical, emotional, or economic damage resulting from New GM's conduct.

1490. Plaintiffs also seek punitive damages against New GM because it carried out reprehensible conduct with willful and conscious disregard of the rights and safety of others, subjecting Plaintiffs and the California Class to potential cruel and unjust hardship as a result. New GM intentionally and willfully deceived Plaintiffs on life-or-death matters, and concealed material facts that only New GM knew. New GM's unlawful conduct constitutes malice, oppression, and fraud warranting punitive damages under CAL. CIV. CODE § 3294.

1491. Plaintiffs further seek an order enjoining New GM's unfair or deceptive acts or practices, restitution, punitive damages, costs of court, attorneys' fees under CAL. CIV. CODE § 1780(e), and any other just and proper relief available under the CLRA.

1492. Certain Plaintiffs have sent a letter complying with CAL. CIV. CODE § 1780(b).

## **COUNT II**

### **VIOLATION OF THE CALIFORNIA UNFAIR COMPETITION LAW**

**(CAL. BUS. & PROF. CODE § 17200, *et seq.*)**

1493. Plaintiffs reallege and incorporate by reference all paragraphs as though fully set forth herein.

DATED: June 12, 2015

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# Exhibit 5

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# Exhibit 6

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# Exhibit 7

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# Exhibit 10

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# Exhibit 11

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# Exhibit 12

FILED UNDER SEAL

FILED UNDER SEAL



# Exhibit 4

# 15-2844(L), 15-2847(XAP), 15-2848(XAP)

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## United States Court of Appeals

*for the*

## Second Circuit

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In the Matter of: Motors Liquidation Company,

*Debtor.*

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*(For Continuation of Caption See Inside Cover)*

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ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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### BRIEF FOR APPELLANT IGNITION SWITCH PLAINTIFFS

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*Appellants-Cross-Appellees,*

IGNITION SWITCH PLAINTIFFS, IGNITION SWITCH PRE-CLOSING  
ACCIDENT PLAINTIFFS, THE STATE OF ARIZONA, PEOPLE OF  
THE STATE OF CALIFORNIA, GROMAN PLAINTIFFS,

*Appellants,*

— v. —

GENERAL MOTORS LLC,

*Appellee-Cross-Appellant,*

WILMINGTON TRUST COMPANY,

*Trustee-Appellee-Cross-Appellant,*

PARTICIPATING UNITHOLDERS,

*Creditor-Appellee-Cross-Appellant.*

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## **CORPORATE DISCLOSURE STATEMENT**

No corporate disclosure statement is required for the Ignition Switch  
Plaintiffs, all of whom are individuals.

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## I. STATEMENT OF JURISDICTION<sup>1</sup>

The Ignition Switch Plaintiffs (“ISPs”) are owners and lessees of cars manufactured by Old GM seeking to recover economic losses after the revelations that first Old GM and then New GM intentionally concealed the Ignition Switch Defect that caused cars to stall and disabled their airbags, and also concealed a plethora of other safety defects resulting from the companies’ systemic devaluation of safety.

The ISPs appeal from the April 15, 2015 Opinion (Joint Special Appendix (“SPA”)-277-417) and the June 1, 2015 Judgment (SPA-253-73) of the United States Bankruptcy Court for the Southern District of New York (Robert E. Gerber, *Bankruptcy Judge*) which held that the “Free and Clear Provisions” of the Sale Order which gave rise to New GM would be applied against the ISPs to bar many of their claims against New GM even though, as the Bankruptcy Court found, the ISPs were deprived of the notice and opportunity to be heard that the Due Process clause requires. The Bankruptcy Court’s Opinion is reported at 529 B.R. 510. The Bankruptcy Court had subject matter jurisdiction to issue the Judgment pursuant to

---

<sup>1</sup> For ease of reference, the Ignition Switch Plaintiffs adopt the definitions of capitalized terms in the Glossary that appears at the beginning of the *Brief for Ignition Switch Pre-Closing Accident Plaintiffs*, also filed today. Other capitalized terms are defined herein.

28 U.S.C. §§ 157(a), (b), and 1334, but, for the reasons stated herein, it lacked jurisdiction to enjoin direct claims against New GM arising solely from its post-Sale violations of its independent legal duties. The Judgment is a final order that disposes of the ISPs' successor liability claims against New GM, and bars the ISPs from recovery from the assets of the GUC Trust established to administer the Old GM estate. The ISPs filed a timely notice of appeal from the Opinion and Judgment on June 2, 2015 (A-10987-990).

On June 1, 2015, the Bankruptcy Court certified the Judgment for direct appeal pursuant to 28 U.S.C. § 158(d) and Bankruptcy Rule 8006(e) (SPA-274-76). This Court granted the petition of certain parties to appeal on September 9, 2015. SPA-456-57. On October 8, 2015, this Court designated the ISPs as appellants. This Court has jurisdiction over this appeal under 28 U.S.C. § 158(d)(1).

## **II. STATEMENT OF ISSUES PRESENTED ON APPEAL**

1. Did the Bankruptcy Court err in holding that prejudice, beyond the deprivation of notice and the opportunity to be heard, must be shown to entitle a victim of a due process violation to a remedy?

2. Assuming that a show of prejudice is required, did the Bankruptcy Court err in finding that the ISPs did not show prejudice when the lack of notice

and the opportunity to be heard resulted in the Bankruptcy Court enjoining the ISPs' claims under the Sale Order where neither the Bankruptcy Court, the U.S. government nor the ISPs had any knowledge of the Ignition Switch Defect at the time of the Sale Hearing?

3. Did the Bankruptcy Court err in failing to consider Old and New GM's improper concealment of the Ignition Switch Defect in connection with the enforcement of the Sale Order?

4. Did the Bankruptcy Court err in enforcing the Sale Order against Used Car Purchasers who bought their Old GM vehicles after the Sale?

5. Did the Bankruptcy Court err in holding the Sale Order's injunctive provisions remain in effect to bar direct and independent claims against New GM unless a due process violation is shown?

6. Did the Bankruptcy Court err in applying the doctrine of equitable mootness to prevent recovery on the claims of the ISPs?

### **III. STATEMENT OF THE CASE**

The Sale Order through which New GM acquired substantially all of the assets of Old GM provided New GM immunity against successor liability claims. A-1648-50, ¶¶ 46-47. The Bankruptcy Court upheld the successor liability bar against the ISPs despite holding that the ISPs were deprived of their due process

rights to notice and the opportunity to be heard at the Sale Hearing. Opinion, 529 B.R. 510. However, for years before the entry of the Sale Order, a “critical mass” of Old GM employees (including lawyers, engineers and senior managers) knew, but concealed, that scores of GM vehicles contained the deadly Ignition Switch Defect, which caused sudden stalls and disabled the Subject Vehicles’ airbags. Opinion, 529 B.R. at 557-58. When Old GM became New GM via the Sale, New GM inherited Old GM’s books and records and employees with knowledge of the Ignition Switch Defect. *Id.* at 538. Old GM’s longstanding concealment of the Ignition Switch Defect was over—and New GM’s cover-up of the Ignition Switch Defect began. A-5976-6008. For over 12 years Old GM and then New GM hid the truth from the public, federal safety monitors and the Plaintiffs—safety concerns were being sacrificed for profit. *Id.* Under the Sale Order as enforced by the Bankruptcy Court, New GM benefits from a bar against successor liability claims notwithstanding the concealment of the Ignition Switch Defect.

The Ignition Switch Defect causes a vehicle’s ignition switch to move from the “Run” position to the “Accessory” or “Off” position during ordinary driving, causing the vehicle to lose power steering and power brakes and disabling the airbags. A-5977, ¶ 1.



Old GM knew of the Ignition Switch Defect for more than five years before the Sale Hearing. A-5978-79, ¶¶ 5-8. In 2004, the first of many otherwise preventable fatal and serious accidents occurred, and many followed during the five years before the Sale. A-5984, ¶ 14(C)(1); A-5988-89, ¶ 14(H)(1); A-5992-93, ¶ 14(L). *See also* A-9761-62, A-9772, A-9778, A-9780.

The cover-up of the Ignition Switch Defect began as soon as Old GM discovered the problem: starting in 2005, Old GM issued original and then updated Service Bulletins to its dealers about the problem that purposefully did not contain the word “stall” or warn of the actual danger inherent in the Subject Vehicles. A-5979-80, ¶ 10. Then, in 2006, based on its knowledge of the Ignition Switch Defect, Old GM redesigned the Ignition Switch *without fixing the defect* in some two million cars that were on the road. A-5991, ¶ 14(I)(v). For years leading up to the bankruptcy filing, Old GM knew of the Ignition Switch Defect, but it chose to do nothing to protect the public safety. Opinion, 529 B.R. at 538, 557.

Consumers who purchased or leased cars with the Ignition Switch Defect had no way of knowing of the illegally concealed defect. *Id.* at 538 (“there is no evidence in the record ... that any Plaintiff knew of the Ignition Switch Defect before ... 2014”). The ISPs received no direct notice of the Sale Hearing, the

Ignition Switch Defect, or the impending bar of successor liability claims. *Id.* at 525.

Nothing changed for five years after the Sale Hearing, as the culture of cover-up and the elevation of costs over safety continued at New GM. A-9787-9906. Not until 2014 did New GM make its long-overdue and federally mandated revelations of the massive and deadly defect and institute recalls for an estimated 2.1 million Subject Vehicles. Opinion, 529 B.R. at 521; *see also* A-5929; A-8796. The adverse publicity occasioned by these massive recalls and the resulting firestorm of investigations belied New GM's contentions that the GM brand was synonymous with safety and reliability. *See, e.g.*, A-9969-10035; A-9639-9963. As soon as they learned of the Ignition Switch Defect, the ISPs brought a number of lawsuits against New GM for its conduct in hiding the Ignition Switch Defect and dozens of other defects while at the same time assuring customers of the safety of its brand, causing significant economic losses; these lawsuits were transferred to the MDL Court. Opinion, 529 B.R. at 521-22.

Following the transfer, the ISPs' filed Consolidated Complaints in the MDL action. A-6347-7735. Among other things, the Complaints seek damages in the form of diminution in value of all Old and New GM vehicles caused by the Ignition Switch Defect and dozens of other defects concealed by New GM until

2014, Old and New GM’s respective roles in concealing these defects, and the resulting negative publicity generated by the recall of 27 million vehicles in 2014 (including 13 million vehicles with the Ignition Switch Defect and other similar ignition switch defects). *Id.*

The Bankruptcy Court formulated several “Threshold Issues” to be adjudicated in connection with New GM’s Motions to Enforce. A-5778-83. After briefing on these issues, the Bankruptcy Court issued its Opinion, dated April 15, 2015, 529 B.R. 510, and thereafter entered its June 1, 2015 Judgment, SPA-253-73. The Bankruptcy Court’s rulings are detailed below in Section E. Immediately below is a brief summary of relevant facts and background.

**A. Old GM initiates a chapter 11 bankruptcy and files the Sale Motion.**

On June 1, 2009, Old GM and three affiliates commenced jointly administered chapter 11 cases before the Bankruptcy Court, and Old GM filed the Sale Motion seeking approval of, *inter alia*, the Sale Procedures and the Sale. Opinion, 529 B.R. at 530.

In its Sale Motion, Old GM sought authority to sell substantially all of its assets to New GM “free and clear of all other ‘liens, claims, encumbrances and other interests,’ including, specifically, ‘all successor liability claims.’” *Id.* (citations omitted).

On June 2, 2009, the Bankruptcy Court entered its Sale Procedures Order.

*Id.* at 531.

**B. The ISPs were deprived of notice of the Sale and an opportunity to be heard in connection with the Sale Order.**

The Sale Procedures Order provided for actual notice to 25 categories of persons who were considered known creditors. *See* A-385-86, ¶¶ 9(a)(i)-(xxv), 9(b)(i)-(ii). The Sale Procedures Order also provided for publication notice of the Sale. A-386, ¶ 9(e). Despite being known creditors of Old GM, the ISPs did not receive actual notice of the Sale Hearing. *Opinion*, 529 B.R. at 525. Neither direct nor publication notice disclosed the Ignition Switch Defect or that the ISPs' resultant claims were to be foreclosed under the Sale Order. *Id.*

**C. The Sale Agreement and Sale Order imposed recall obligations on New GM with respect to Old GM cars and parts, and the GUC Trust was established to distribute the assets of the bankruptcy estate.**

The Sale Agreement, originally filed with the Sale Motion on June 1, 2009, was thereafter amended, *inter alia*, to provide that New GM would assume: (i) liabilities under state Lemon Laws; and (ii) responsibility for any and all accidents or incidents giving rise to death, personal injury, or property damage after the date of closing of the Sale, irrespective of whether the vehicle was manufactured by Old or New GM. *Opinion*, 529 B.R. at 534.

Notably, the Sale Agreement and Sale Order required New GM to comply with recall obligations imposed by federal law, even for cars or parts manufactured by Old GM. In particular, the Sale Order provided that “the Purchaser shall comply with the certification, reporting, and recall requirements of the National Traffic and Motor Vehicle Safety Act, as amended and recodified, including by the Transportation Recall Enhancement, Accountability and Documentation Act,<sup>[2]</sup> ..., and similar Laws, in each case, to the extent applicable in respect of motor vehicles, vehicles, motor vehicle equipment, and vehicle parts manufactured or distributed by the Sellers prior to the Closing.” *Id.* at 535; *see also* A-1633-34, ¶ 17.

On March 29, 2011, Old GM’s chapter 11 plan of liquidation (the “Plan”) was confirmed. *Opinion*, 529 B.R. at 535. The Confirmation Order authorized the creation of the GUC Trust to distribute assets of the Old GM estate and object to claims. *Id.* at 536. The GUC Trust has distributed assets worth billions of dollars to holders of Allowed General Unsecured Claims under the Plan, currently holds many hundreds of millions of dollars of assets and may obtain additional shares of

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<sup>2</sup> The “Safety Act,” 49 U.S.C. §§ 30101, *et seq.*, mandates, among other things, that car manufacturers monitor vehicles for safety defects, and conduct recalls when necessary.

New GM common stock (potentially worth a billion dollars) through the exercise of an “Accordion Feature” under the Sale Agreement. *See infra* at 49-50.

**D. Consistent with their culture of hiding safety problems, both Old and New GM concealed the Ignition Switch Defect and did not conduct federally-mandated recalls.**

New GM’s extraordinary delay in conducting its massive 2014 recalls was, in no small part, the result of a culture marked by a “not me” attitude, typified by the notorious “GM Salute” and “GM Nod” where employees were taught to avoid responsibility and passively agree to action that they had no intention of following up on, and exemplified by the practice of training employees to avoid plain safety and defect-related language. A-9903-04.

The result was that at least 24 Old GM personnel (*all of whom were transferred to New GM*), including engineers, senior managers and attorneys, were aware of the Ignition Switch Defect prior to the Sale Motion, but did nothing until New GM finally issued the recalls in 2014.<sup>3</sup> The corporate culture that placed profits over safety ran deep at Old and New GM. *Id.*

It is undisputed that Old GM personnel knew enough as of the time of Old GM’s June 2009 bankruptcy filing such that Old GM was obligated, under the

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<sup>3</sup> See A-5981, ¶ 14; Opinion, 529 B.R. at 538, 557-58.

Safety Act, to conduct a recall of the vehicles with the Ignition Switch Defect.

Opinion, 529 B.R. at 557.

**E. Disposition below.**

The Bankruptcy Court correctly held that Plaintiffs who owned or leased cars with the Ignition Switch Defect were “known” creditors at the time of the Sale, and that they were therefore entitled to *actual* notice of the Sale and the Bar Date for filing proofs of claim against the Old GM estate before their rights could be extinguished. Opinion, 529 B.R. at 525. However, the Bankruptcy Court found that “the failure to provide the notice that due process requires” was not enough to “establish[] a due process violation.” *Id.* Instead, Plaintiffs were required to show “that they have sustained prejudice as a result” of the lack of notice. *Id.* at 526.

In finding that the Plaintiffs failed to demonstrate prejudice, the Bankruptcy Court relied on the fact that other parties had made arguments against the successor liability bar at the Sale Hearing and that those arguments were properly considered and rejected. *Id.* Consequently, “while the Plaintiffs established a failure to provide them with the notice due process requires, they did not establish a due process violation” with respect to the Sale Order, and “[t]he Free and Clear Provisions stand.” *Id.*

However, the Bankruptcy Court found that the Plaintiffs *were* prejudiced in one respect because no party at the Sale Hearing “argued a point that they argue now: that the proposed Sale Order was overly broad, and that it should have allowed them to assert claims involving Old GM vehicles and parts so long as they were basing their claims *solely on New GM* conduct, and not based on any kind of successor liability or any other act by Old GM.” *Id.* at 526-27 (emphasis in original). The Judgment terms these “Independent Claims.” SPA-254, ¶ 4. Accordingly, the Judgment allows owners and lessees of vehicles with the Ignition Switch Defect to bring Independent Claims. *Id.* But other Old GM vehicle owners are *not* permitted to assert Independent Claims. *Id.* See also SPA-441-55 (Form of Judgment Decision), *In re Motors Liquidation Co.*, 531 B.R. 354, 360 (Bankr. S.D.N.Y. 2015).

The Bankruptcy Court held that “Plaintiffs were plainly prejudiced” by the lack of notice of the Bar Date. Judgment, SPA-254-55, ¶ 6. Accordingly, Plaintiffs would be permitted to seek to file late proofs of claim against the Old GM bankruptcy estate. *Id.* However, the Bankruptcy Court made any such “remedy” illusory since, “based on the doctrine of equitable mootness, in no event shall assets of the GUC Trust held at any time in past, now, or in the future ... be used to satisfy any claims of the Plaintiffs.” *Id.*



#### IV. SUMMARY OF ARGUMENT

The Bankruptcy Court properly found that: (i) the ISPs were known creditors entitled to direct notice of the Sale Hearing and the prospective elimination of their successor liability claims against New GM; and (ii) the publication notice provided by Old GM (which failed to disclose the existence of the Ignition Switch Defect) was insufficient for due process purposes. However, the Bankruptcy Court erred in finding that (i) the ISPs needed to show prejudice in order to be entitled to a remedy for the denial of due process, and (ii) no such prejudice had been demonstrated.<sup>4</sup>

When there is neither notice nor an opportunity to be heard, no additional showing of prejudice is required: the denial *is* the prejudice. Because due process guarantees the right to be heard, not the right to win, an order issued without providing notice and the right to be heard is unenforceable against the party deprived of that right. There is no way to determine, some five years later, what the outcome would have been had the bombshell of Old GM's concealment of the Ignition Switch Defect been made known to the Bankruptcy Court, the Treasury, Congress, the public, the press and the various objectors. That is precisely why the

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<sup>4</sup> These points are discussed more fully in the *Brief for Ignition Switch Pre-Closing Accident Plaintiffs*, also filed today, whose arguments relating to due process are incorporated herein by reference.

case law is so clear that when there is a denial of due process, the resulting order cannot be enforced against the parties so deprived.

Even assuming that prejudice is required, the ISPs *were* prejudiced. When New GM sought to enforce the Sale Order's successor liability bar, the Bankruptcy Court erred by failing to consider the overwhelming evidence that (i) Old GM and then New GM illegally concealed the Ignition Switch Defect, and (ii) New GM intended from day one to continue to unlawfully suppress information regarding the Ignition Switch Defect. Enforcing the Sale Order's successor liability bar prejudices the ISPs because the Bankruptcy Court did not know in 2009 what the evidence shows now: Old GM concealed the Ignition Switch Defect at the time of the Sale and New GM continued the illegal concealment and caused the ISPs' massive economic losses. It is impossible to believe that the successor liability ban against the ISPs would have been approved as written in the Sale Order had Plaintiffs, the U.S. government and the Bankruptcy Court been aware of the Ignition Switch Defect and its horrific consequences prior to the Sale Hearing. Given that New GM retained Old GM's books and records and the same employees with knowledge of the Ignition Switch Defect, the only inference is that New GM was effectively "born" with the same bad intent to cover-up the Ignition Switch Defect that motivated Old GM. The enforcement of a Sale Order

protecting a purchaser born with illegal motivations is unwarranted. In sum, Plaintiffs' arguments would likely have resulted in the narrowing or elimination of the successor liability bar in the Sale Order based on a finding that the Ignition Switch Defect was improperly concealed or that New GM was not a "good faith purchaser." The Bankruptcy Court failed to consider the impact of New GM's unclean hands and unlawful conduct in connection with the enforcement of the Sale Order's successor liability bar and therefore committed reversible error.

In addition to its errors relating to the successor liability claims of pre-Sale purchasers and lessees of cars with the Ignition Switch Defect, the Bankruptcy Court erred by enforcing the Sale Order against post-Sale purchasers of Old GM vehicles ("Used Car Purchasers") in violation of their due process rights. Used Car Purchasers were, at the time of entry of the Sale Order, "future claimants" to whom no notice was possible.

Likewise, the Bankruptcy Court erred in holding that only Old GM car owners who suffered a due process violation may bring claims against New GM based solely on New GM's own independent post-Sale conduct. The Bankruptcy Court lacks jurisdiction to enjoin such claims or to condition third-party non-successor liability claims against New GM on a finding of a due process violation.

Finally, the Bankruptcy Court erred by finding equitable mootness applicable as a bar to Plaintiffs' right to recovery against the Old GM estate/GUC Trust (separate and distinct from Plaintiffs' claims against New GM). The Bankruptcy Court properly found a due process violation in connection with the notice of the Bar Date for filing proofs of claim against Old GM and, accordingly, that Plaintiffs should be allowed to file late proofs of claim against the GUC Trust. The doctrine of equitable mootness cannot properly be expanded to bar recovery for creditors who were deprived of due process. However, the Bankruptcy Court found that, based on equitable mootness, none of the past, present or future assets of the GUC Trust may be used to satisfy any subsequently allowed claims of Plaintiffs. The Bankruptcy Court abused its discretion by employing the constitutionally suspect and disfavored doctrine of equitable mootness, without any precedent, to effectuate a complete bar to bankruptcy claims recoveries for Plaintiffs whose due process rights were violated. Furthermore, to the extent they are applicable, the Bankruptcy Court erred by holding that Plaintiffs cannot satisfy three of the five *Chateaugay* factors, and in doing so abused its discretion. Accordingly, the Plaintiffs who were deprived of due process should be allowed to seek a remedy from the GUC Trust separate and distinct from the Plaintiffs' claims against New GM.

## V. STANDARD OF REVIEW

On direct appeal, this Court “undertakes an independent examination of the factual findings and legal conclusions of the bankruptcy court.” *In re Duplan Corp.*, 212 F.3d 144, 151 (2d Cir. 2000). The Bankruptcy Court’s conclusions of law are reviewed *de novo* and its findings of fact are reviewed for clear error. *See In re Barnet*, 737 F.3d 238, 246 (2d Cir. 2013); *Pension Benefit Guar. Corp. v. Oneida Ltd.*, 562 F.3d 154, 156 (2d Cir. 2009). The Bankruptcy Court’s equitable mootness ruling is reviewed “for abuse of discretion, under which [the Court] examine[s] conclusions of law *de novo* and findings of fact for clear error.” *In re BGI, Inc.*, 772 F.3d 102, 107 (2d Cir. 2014) (“*BGI II*”), *cert. denied*, \_\_ U.S. \_\_, 193 L. Ed. 2d 44 (2015).

## VI. ARGUMENT

### A. **The Bankruptcy Court erred in holding that the ISPs must demonstrate prejudice in order to establish a due process violation.**

The Fifth Amendment to the United States Constitution provides that the federal government cannot deprive a person of life, liberty or property without due process of law. “An essential principle of due process is that a deprivation of ... property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542

(1985) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

The Supreme Court has called notice and an opportunity to be heard the “root requirement” of due process. *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The purpose of this “root requirement” is “to minimize substantively unfair ... deprivations of property.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

The Bankruptcy Court ruled that the ISPs were entitled to, but did not receive, either notice or an opportunity to be heard in connection with the Sale Hearing.<sup>5</sup> The Bankruptcy Court nonetheless held that, because the ISPs could not show they were prejudiced by this deprivation, they could not prevail on their due process claims.<sup>6</sup> By minimizing the “root requirement” of due process—notice and an opportunity to be heard—and by interposing a prejudice requirement, the Bankruptcy Court committed legal error.

The Supreme Court has repeatedly held that the denial of notice and an opportunity to be heard is a *per se* constitutional violation that entitles the injured party to relief—even where (unlike here) the underlying claim is without merit.

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<sup>5</sup> See Opinion, 529 B.R. at 554-55, 560.

<sup>6</sup> See *id.* at 560-68. “Prejudice,” according to the Bankruptcy Court, required the ISPs to show that the denial of due process would have changed the outcome of the Sale Order proceedings.

*See, e.g., Carey v. Piphus*, 435 U.S. 247, 266 (1978) (“[T]he right to procedural due process is ‘absolute’ in the sense that it does not depend on the merits of a claimant’s substantive assertions[.]”); *Fuentes v. Shevin*, 407 U.S. at 87 (assuming that the defendant had no valid defenses to an action, but nonetheless concluding that “[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing”).

It is for good reason that no additional prejudice is required to obtain a remedy for the deprivation of notice and the opportunity to be heard. The absolute nature of the Due Process clause means that “the risk of error” arising when a person is deprived of valuable rights without notice “was more than the Framers would tolerate. We can prevent erroneous deprivations from some only by providing a process to all.” *Lane Hollow Coal Co. v. Dir., Office of Workers’ Comp. Programs DOL*, 137 F.3d 799, 806 (4th Cir. 1998). “If there has been no fair day in court, the reliability of the result is irrelevant, because a fair day in court is how we assure the reliability of results.” *Id.* at 808. The impropriety of a prejudice requirement is amply illustrated on the facts of this case, where the lack of notice and the concealment of the Ignition Switch Defect prevented **anyone** from apprising the Bankruptcy Court of the egregious conduct of Old GM in connection with the defect and the resultant severe damage inflicted on Plaintiffs.

*See In re New Concept Housing, Inc.*, 951 F.2d 932, 942 (9th Cir. 1991)

(dismissing as “sheer improper speculation” and “hindsight rationalization[.]” the argument that an improperly noticed debtor’s objection would not have made any difference in approval of settlement). The Due Process clause simply does not permit Monday-morning quarterbacking in connection with a game that Plaintiffs were precluded from playing in real time.

This Court recently rejected a prejudice requirement in *In re Johns-Manville Corp.*, 600 F.3d 135 (2d Cir. 2010) (*per curiam*) (“*Manville IV*”), where it ruled that an entity was not bound by a series of bankruptcy orders when it had never received notice or an opportunity to be heard. *Id.* at 154-56. In *Manville IV*, this Court did not consider whether the complaining party suffered prejudice *other than* denial of notice and an opportunity to be heard; rather, this Court’s decision was focused squarely (and exclusively) on the denial of those core due process rights. *See id.* at 157. Having determined that the appellant was denied notice and an opportunity to be heard, this Court concluded that the bankruptcy court’s orders were not binding on the appellant.<sup>7</sup>

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<sup>7</sup> The Bankruptcy Court dismissed application of *Manville IV* to this case, speculating that “prejudice” to the appellant in *Manville IV* was so “obvious” that this Court’s opinion neglected to discuss it. *See* Opinion, 529 B.R. at 560 n.161. However, *Manville IV* does not mention the word “prejudice” because the inquiry would have been inapplicable and superfluous: the *Manville IV* appellant was



*Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80 (1988), is another case in point. There, a debtor defaulted in a collection suit and his creditor obtained a default judgment. *Id.* at 81-82. Two years later, the debtor challenged the entry of default because the debtor was never served. *Id.* at 82. The creditor conceded that service was deficient, but claimed that the debtor suffered no prejudice because he had no defense on the merits and the outcome, with or without proper service, would have been the same. *Id.* at 82-84. The *Peralta* Court assumed that the debtor would have lost on the merits. It nonetheless called the creditor’s argument “untenable,” and stated, “[f]ailure to give notice violates ‘the most rudimentary demands of due process of law.’” *Id.* at 84 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)). The Court reversed the state-court orders affirming entry of default against the debtor. *See id.* at 87.

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deprived of notice and an opportunity to be heard, so it could not be bound by the bankruptcy court’s prior orders. Indeed, this is precisely how lower courts, other than the Bankruptcy Court here, have interpreted the *Manville IV* decision. *See, e.g., In re Johns-Manville Corp.*, 534 B.R. 553, 561 (Bankr. S.D.N.Y. 2015) (interpreting *Manville IV* as holding that “the Second Circuit held that at least one objecting party ... was not bound by the 1986 Orders because it had not received constitutionally sufficient notice of the proceedings”). The *Manville IV* decision also cuts against the Bankruptcy Court’s justification for elevating the parties’ expectations in finality above due process concerns. *See* Opinion, 529 B.R. at 564. *Manville IV* concerned a bankruptcy proceeding whose “magnitude and complexity ... are unparalleled.” *Manville IV*, 600 F.3d at 138. Nonetheless, this Court held that due process is critical, and the parties’ expectations, even in a complex commercial arrangement, are not sufficient to usurp that bedrock right. *Id.*

In and outside of the bankruptcy context, it is a bedrock principle that the lack of notice and an opportunity to be heard constitutes a due process injury, even when the outcome would have been the same. *See, e.g., USX Corp. v. Champlin*, 992 F.2d 1380, 1384-85 (5th Cir. 1993) (holding that lienholder’s due process rights were violated even if adequate notice would likely not have affected outcome of foreclosure sale). *See also N.J. Div. of Youth & Family Servs. v. R.D.*, 23 A.3d 352, 370-72 (N.J. 2011).

A complete deprivation of notice and opportunity to be heard is *per se* prejudice. *See, e.g., Lane Hollow Coal Co.*, 137 F.3d at 806 (“[T]here must be a *process* of some kind; a just result is not enough.”); *see also Republic Nat’l Bank v. Crippen*, 224 F.2d 565, 566 (5th Cir. 1955) (reversing bankruptcy court denial of fees—without notice or opportunity to object—to creditor class and observing that denial of notice and an opportunity to be heard is “***never*** harmless error”) (emphasis added).

Notably, this precept holds even when others with the same claims as the person who was deprived of notice are given proper notice. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469-72 (2000) (where individual owner of a one-person corporation was determined to be eligible for suit in his individual capacity, the failure to provide him notice and an opportunity to defend was not harmless error

even when individual and corporate party purportedly had the same claims and defenses).

In reaching its determination that prejudice must be shown before a remedy for a due process violation is warranted, the Bankruptcy Court relied on ten cases, eight from outside the Second Circuit, each of which contain the generalized statement that “a party who claims to be aggrieved by a violation of procedural due process must show prejudice.”<sup>8</sup> However, these cases neither refute the authority set forth above nor establish that Plaintiffs must prove anything beyond the complete deprivation of notice and an opportunity to be heard to prevail on their due process claim.

Most of the cases relied on by the Bankruptcy Court stand for the unremarkable proposition that if a party is provided with *some* notice, and the party has an *actual* opportunity to be heard, it has not suffered a due process violation unless the procedural imperfections caused actual prejudice.<sup>9</sup> In the

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<sup>8</sup> Opinion, 529 B.R. at 560 & n.162 (quoting *Perry v. Blum*, 629 F.3d 1, 17 (1st Cir. 2010)).

<sup>9</sup> See *In re Parcel Consultants, Inc.*, 58 F. App’x 946, 950-51 (3d Cir. 2003) (party claimed it was denied due process when district court did not permit briefing, but party was permitted full briefing and argument on appeal); *Rapp v. U.S. Dep’t of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1519-20 (10th Cir. 1995) (party received notice of regulatory violations, appeared at hearing to defend, but claimed notice was not sufficiently clear); *Cedar Bluff Broad., Inc. v.*

principal case cited by the Bankruptcy Court, *Perry v. Blum*, 629 F.3d 1 (1st Cir. 2010), the complaining parties had actual notice of the proceedings, were named parties and testified. *Id.* at 16-17. The complainants' argument was not that they had been completely deprived of notice and an opportunity to be heard, but rather that they were not joined as parties to the suit at an earlier time. *Id.* at 17. In none of the cases relied on by the Bankruptcy Court was the complaining party denied all notice and opportunity to be heard. In each case, the party had an opportunity to participate in the proceedings and argue the substantive issues present before the adjudicating body. The ISPs received no such process.

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*Rasnake*, 940 F.2d 651 (4th Cir. 1991) (although all parties did not have notice that a chapter 11 confirmation hearing would also entertain other motions, all interested parties participated in the hearing and had an opportunity to present argument); *Brock v. Dow Chem. U.S.A.*, 801 F.2d 926, 928-30 (7th Cir. 1986) (defendant received notice of OSHA violations and had opportunity to be heard before ALJ, but claimed the notice lacked sufficient specificity); *Savina Home Indus., Inc. v. Secretary of Labor*, 594 F.2d 1358, 1365-66 (10th Cir. 1979) (defendant received notice of OSHA violations and had opportunity to be heard but claimed notice was deficient because it contained wrong docket number and Secretary did not serve defendant with copies of standards violated); *In re Caldor, Inc.*, 240 B.R. 180, 188 (Bankr. S.D.N.Y. 1999) (objector not given notice but provided full opportunity to present its arguments during course of hearing), *aff'd sub nom. Pearl-Phil GMT (Far E.) Ltd. v. Caldor*, 266 B.R. 575, 583-84 (S.D.N.Y. 2001); *In re Gen. Dev. Corp.*, 165 B.R. 685, 688-89 (S.D. Fla. 1994) (party was initially denied notice and an opportunity to be heard, but court vacated order to allow parties who did not receive notice to participate during a rehearing). One of the ten cases relied upon by the Bankruptcy Court did not even involve a due process claim. *See In re New Concept Housing, Inc.*, 951 F.2d at 937 n.7 (finding no due process claim where party had no property interest and thus no constitutional entitlement to notice).

**B. The Bankruptcy Court erred in holding that the ISPs failed to demonstrate prejudice in connection with the entry and/or enforcement of the Sale Order where no one knew of the fraudulent concealment of the Ignition Switch Defect at the time of the Sale.**

The Bankruptcy Court erroneously concluded that the ISPs “were not prejudiced” with respect to successor liability on the sole basis that other creditors received notice and an opportunity to be heard, and those creditors made all of the arguments and raised all of the objections that the ISPs could have raised.

Opinion, 529 B.R. at 568. The Bankruptcy Court reasoned that the ISPs “offer[ed] no legally based arguments as to why they would have, or even *could have*, succeeded on the successor liability legal argument when all of the other objectors failed.” *Id.* at 567 (emphasis in original). The Bankruptcy Court’s conclusion is wrong in several respects.

The participation of other known creditors does not supply due process, nor does it afford preclusive effect. Preclusion of the ISPs’ claims was constitutionally permissible only through their inclusion in the proceedings, through service of process or notice calculated to fairly inform them of the matters that were instead concealed. *See Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). The law does not countenance preclusion by proxy.

Without notice and an opportunity to be heard, no one can be bound by decisions made in their absence. “Nor without more, and with the due regard for

the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.” *Id.* at 44. Class actions afford preclusion by representation, but only upon a showing of “best practicable” notice (usually with a right to opt-out), and a determination that the representative parties’ interests fully align with those of the absent members. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Nothing remotely approaching these indispensable requisites occurred here. The Supreme Court has put it bluntly:

Some litigants-those who never appeared in a prior action-may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence or arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

*Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 329 (1971).

The Bankruptcy Court therefore committed legal error when it concluded that the failure to afford the ISPs notice and an opportunity to be heard was somehow cured by the appearance of consumer groups and certain creditors. Opinion, 529 B.R. at 567. The simple fact is that none of the parties arguing against a successor liability ban raised or could have raised issues of intentional

concealment of the deadly Ignition Switch Defect. According to the Bankruptcy Court, “*Mullane* recognizes that where notice is imperfect, the ability of others to argue the point would preclude the prejudice that might result if none could.”<sup>10</sup>

This reading of *Mullane* is unsound. The *Mullane* decision had nothing to do with prejudice; it was a case wholly concerned with the adequacy of notice. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 307 (1950).

Though the trust beneficiaries in *Mullane* were not personally served, they were deemed to have received constitutionally sufficient notice given the role played by their trustee. *Id.* at 318-19. *Mullane* does not stand for the proposition that notice may be denied to some parties so long as someone with similar interests is capable of being heard. Rather, *Mullane* holds that in certain scenarios, noticing a trustee on behalf of its beneficiaries may be constitutionally sufficient. *See id.*

Here, creditors and consumer groups that appeared at the Sale Hearing had no obligation or authority to speak for the ISPs. Moreover, none of them could have made the arguments advanced below by the Plaintiffs in opposition to the enforcement of the Sale Order because none of them knew that Old GM and then New GM were unlawfully concealing the fact that GM cars were dangerously defective.

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<sup>10</sup> Opinion, 529 B.R. at 566.

The ISPs, equipped with an unprecedented set of facts and saddled with millions of vehicles containing life-threatening defects, surely *would have* confronted the Bankruptcy Court, Old GM and the U.S. Treasury with highly unique circumstances that demanded a specifically-tailored response.<sup>11</sup> Indeed, the Bankruptcy Court based its no prejudice determination on its speculative hindsight only on what *it* might have done, Opinion, 529 B.R. at 567, ignoring that there were other significant actors—Plaintiffs, Old GM, Treasury, the political branches (Congress and the White House), the press and public opinion—whose reactions and actions would have impacted the issue of whether the ISPs’ claims would be barred by the Sale Order. That these actors would have acted is clear from the uproar that ensued among the public, in the halls of elected government and in the courts when New GM finally disclosed the Ignition Switch Defect in 2014. *See supra* at 6.

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<sup>11</sup> Requiring parties to show prejudice, even after their right to notice and an opportunity to be heard has been denied, invites this sort of speculation. This is yet another reason why a complete deprivation of notice and an opportunity to be heard does not require a litigant to show prejudice—to do so is to speculate. *See Consolidation Coal Co. v. Borda*, 171 F.3d 175, 184 (4th Cir. 1999) (finding that a 16-year delay in providing notice of a claim stripped the claimant of a full and fair opportunity to defend itself and refusing to speculate on whether the claimant would have been successful on the merits).



Finally, as the ISPs argued below, multiple outcomes may have resulted had Old GM disclosed the Ignition Switch Defect prior to the Sale Hearing.<sup>12</sup> The outcome was not limited to (i) extinguishment of Plaintiffs' claims, or (ii) liquidation of Old GM. Treasury may well have conceded, or the Court may have imposed, *some* modification to the Sale Order as a prerequisite for effectuating the Sale. Under the circumstances, a real-time recall should have occurred. And, of course, there is no reason a recall should not have happened five years before it did, particularly given the express finding by the Bankruptcy Court (based on, among other things, a "critical mass" of Old GM personnel knowing about the Ignition Switch Defect at the time of the Sale) that, as of the Sale Hearing in 2009:

Old GM had enough knowledge of the Ignition Switch Defect to be required, under Safety Act, to send out mailed recall notices to owners of affected Old GM vehicles.<sup>13</sup>

The Bankruptcy Court offers no justification for ignoring the harms to the ISPs. The economic losses (in the form of diminution of value as well as out-of-pocket costs) caused by the delayed vehicle recall—a recall that Old GM should

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<sup>12</sup> See Designated Counsel's Opposition to New GM's Motions For Enforcement of Sale Order and Injunction, No. 09-50026-reg, Dkt. No. 13025 at 59 (Dec. 16, 2014) (arguing that Old GM and Treasury may have "chosen to deal with objections from Plaintiffs in the same way it chose to deal with objections from consumer safety groups, by adding Plaintiffs' claims to assumed liabilities").

<sup>13</sup> Opinion, 529 B.R. at 557-558 n.154.

have, as a matter of fact, initiated before 2009—squarely constitute prejudice under any analysis.

**C. In enforcing the Sale Order, the Bankruptcy Court erred by failing to take into account the concealment of the Ignition Switch Defect by both Old and New GM and the resulting prejudice to Plaintiffs.**

In enforcing the Sale Order’s successor liability bar against the ISPs, the Bankruptcy Court erred by failing to take into account facts now known. Unlike at the time of the Sale in 2009, by 2014 when New GM sought to enforce the Sale Order’s successor liability bar, it was accepted and widespread knowledge that Old GM had illegally concealed the Ignition Switch Defect and New GM did the same for five additional years.

As a consequence, when evaluating the propriety of enforcing the Sale Order’s bar on successor liability claims, the Bankruptcy Court was required to evaluate the conduct of the seller Old GM and the purchaser New GM—with the true facts revealed. Under that lens, prejudice to ISPs is vividly demonstrated. The record shows that Old GM knew of the Ignition Switch Defect and unlawfully concealed it to evade liability. *See supra* Section III. New GM did the same. *See id.* Based on that record, the successor liability bar in the Sale Order may have been denied or materially scaled back and enforcement of the successor liability bar against the ISPs as it stands is entirely improper. *See Call Ctr. Techs., Inc. v.*

*Grand Adventures Tour*, 635 F.3d 48, 52 (2d Cir. 2011); *In re Savage Indus., Inc.*, 43 F.3d 714, 719 (1st Cir. 1994). It strains belief to imagine that had it been known that two million Old GM cars were on the road with a known, but hidden, life-threatening safety defect, there would have been no change to the Sale Order. Instead, it is more than likely that had Old GM made proper disclosures, the Sale Order would not have included Free and Clear Provisions regarding the Ignition Switch Defect. At a minimum, entry of the Sale Order may have been conditioned on either New GM's assumption of ignition switch liabilities or a materially increased contribution to the GUC Trust. Furthermore, New GM's unlawful concealment of the Ignition Switch Defect should have precluded enforcement of the Sale Order or necessitated revocation or modification of the Sale Order's "good faith purchaser" finding. *See, e.g., In re Gucci*, 126 F.3d 380, 389 (2d Cir. 1997); *In re Engels*, 536 B.R. 529, 536 (Bankr. N.D.N.Y. 2015).<sup>14</sup>

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<sup>14</sup> When it is discovered that a bankruptcy sale was tainted by unlawful conduct, or that the purchaser was otherwise not acting in good faith, a bankruptcy court is empowered to "fashion[] [a] remed[y] based upon the unique factual matrices" present in a given case. *In re Polycel Liquidation, Inc.*, 2006 WL 4452982, at \*11 (Bankr. D.N.J. Apr. 18, 2006), *aff'd*, 2007 WL 77336 (D.N.J. Jan. 8, 2007). (internal quotations and citations omitted). The bankruptcy court may, for example, decline to enter a sale order or to enforce any bar on successor liability. *See In re Global Energies, LLC*, 763 F.3d 1341, 1350 (11th Cir. 2014).

Furthermore, the Bankruptcy Court committed error by failing to consider the record that conclusively shows that New GM inherited the same operative management charged with the same responsibilities for safety and knowledge of the Ignition Switch Defect that beset Old GM. Opinion, 529 B.R. at 538. That knowledge may be imputed to New GM starting with the first day of its existence.<sup>15</sup> The facts known to the Bankruptcy Court as of New GM's Motion to Enforce indisputably prove that New GM inherited the bad motives and intent to conceal the Ignition Switch Defect that Old GM spawned. In other words, at the precise moment the Sale closed, the knowledge and intent of Old GM became the knowledge and intent of New GM (*i.e.*, the knowledge of at least 24 Old GM employees of the Ignition Switch Defect and the books and records identifying the defect were transferred and may be imputed to New GM) and the propriety of the Sale Order's successor liability bar must be evaluated in that context. *See Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974) (fiction of corporate separateness "may be disregarded in the interests of justice where it is used to defeat an overriding public policy"); *Carte Blanche (Singapore) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993) (courts may ignore fiction of

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<sup>15</sup> *See In re Motors Liquidation Co.*, 2015 Bankr. LEXIS 3836, at \*28 (Bankr. S.D.N.Y. Nov. 9, 2015) ("New GM's knowledge may be imputed to it starting with its first day of existence.").

corporate separateness, *inter alia*, “to prevent fraud or other wrong”). That the Bankruptcy Court failed to do so was an abuse of discretion.

Old and New GM’s concealment of the Ignition Switch Defect, taken together with Old GM’s failure to provide the Plaintiffs with adequate notice of the Sale, foreclosed the Plaintiffs from making unique arguments against the Sale Order’s successor liability bar (or the scope thereof). In ignoring Plaintiffs’ allegations of improper concealment and instead concluding that Plaintiffs could not have made an argument that would have affected the successor liability bar, the Bankruptcy Court abused its discretion.

**D. Consistent with the Due Process clause and the Bankruptcy Code, the Sale Order cannot be enforced against Used Car Purchasers who did not own their Old GM vehicles at the time of the Sale.**

The claims of the post-Sale purchasers of Old GM vehicles (the “Used Car Purchasers”) did not exist at the time of the Sale Hearing. The Used Car Purchasers were neither known nor ascertainable, and their eventual claims did not exist. Accordingly, the Used Car Purchasers were “future claimants.” *See In re Grumman Olson Indus.*, 467 B.R. 694, 703 (Bankr. S.D.N.Y. 2012) (future claimants are holders of “a claim against a purchaser that is based on pre-bankruptcy conduct of the debtor that did not cause any harm to an identifiable claimant until after the bankruptcy closed”). Because the Used Car Purchasers’

claims had not arisen at the time of the Sale, neither due process nor the Bankruptcy Code permits the enforcement of the Sale Order against them.

Because future claimants cannot possibly be provided notice of a bankruptcy, “for due process reasons, their claims cannot be discharged” by an order of a bankruptcy court. *Grumman*, 467 B.R. at 707; *see also id.* at 704-05 (“Generally, courts have held that future claims cannot be considered ‘claims’ that are dealt with and discharged.”) (collecting cases in support of same).

*Grumman* is directly on point. There, the bankruptcy court order approving a sale included an injunction against tort claims brought against the purchaser based on allegedly defective products manufactured and sold by the debtor prior to the sale, including any claims based on a successor liability theory. *Id.* at 697. Post-sale, the plaintiff was injured while driving a truck with the debtor’s defective product parts, and brought personal injury claims based on theories of state law successor liability against the purchaser.

The district court found that the sale order could not be enforced to enjoin plaintiff’s claims, reasoning that enforcing such an injunction against the plaintiff, whose identity was unknown and unknowable at the time of the sale, would violate both the Bankruptcy Code and due process. *Id.* at 696; *see also Koepp v. Holland*, 593 F. App’x 20, 23 (2d Cir. 2014) (“Bankruptcy courts cannot extinguish the

interests of parties who lacked notice of or did not participate in the proceedings.”); *In re Chateaugay Corp.*, 944 F.2d 997, 1003 (2d Cir. 1991) (analyzing appropriate notice to be given to claimants who are not only unidentified, but unidentifiable, and noting that “[t]o expect ‘claims’ to be filed by those who have not yet had any contact whatever with the tort-feasor has been characterized as ‘absurd’”) (citations omitted). So too here. There was no way Old GM could have provided Used Car Purchasers with constitutionally adequate notice of the Sale Hearing and, therefore, the Sale Order cannot be enforced to bar their state law successor liability claims against New GM.

Enjoining the claims of the Used Car Purchasers is also inconsistent with Section 363(f) of the Bankruptcy Code, which authorizes an order selling property “free and clear *of any interest*” of any third party (emphasis added). Accordingly, “free and clear” provisions of a sale order can only impact persons who have some “interest” at the time of the sale order; or, as the *Grumman* court put it, a sale order can only extinguish a cause of action that “fall[s] under the definition of ‘claim’ under the Bankruptcy Code.” 467 B.R. at 704. A “claim” is defined as “a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, legal, equitable, secured or unsecured.” 11 U.S.C. § 101(5)(A). Even under this broad definition of

“claim,” it simply cannot be said that the Used Car Purchasers had claims of any sort as of the date of the Sale Hearing—before they ever owned their vehicles. *See Chateauguay*, 944 F.2d at 1003-05 (there is only a contingent “claim” under the Bankruptcy Code when the claimant has a pre-petition relationship with the debtor *and* the cause of action was “within the actual or presumed contemplation” of the claimant and the debtor at the time of the petition). The Bankruptcy Code simply does not provide the authority to enjoin the Used Car Purchasers’ claims.

The Bankruptcy Court agreed that applying the “Free and Clear Provisions” of the Sale Order to bar the Used Car Purchasers’ claims was a violation of their due process rights. *See* Opinion, 529 B.R. at 571. As discussed *supra* at Section VI.A., the remedy for this due process violation is that the Used Car Purchasers are not bound by the Sale Order and may proceed with their claims. *Grumman*, 467 B.R. 694. But the Bankruptcy Court backtracked, and found that due process does not “give Used Car Plaintiffs a do-over” to make “arguments they might have made” at the time of the Sale. Opinion, 529 B.R. at 571. However, the Used Car Purchasers by definition could not have “done” anything at the time of Sale. The arguments they now wish to make (and that due process entitles them to make) concern the wrongdoing of Old and New GM, and their resultant harm.



The Bankruptcy Court also erred in cutting off the claims of Used Car Purchasers because they purportedly sought “greater rights” than the original owners of their vehicles. Opinion, 529 B.R. at 571-72. Not so. In fact, unlike the people who sold their Old GM vehicles before the fraud was revealed, the Used Car Purchasers have economic loss injuries relating to diminution of value and are entitled to remedies. The Bankruptcy Court cited no relevant authority for the proposition that the rights of future claimants (such as the Used Car Purchasers) can permissibly be defined or circumscribed by claimants existing at the time of a § 363 sale.

The theory adopted by the Bankruptcy Court—that Used Car Purchasers are bound by the Free and Clear Provisions as the “successors-in-interest” to the original owners—cannot apply on the facts of this case. While the Bankruptcy Court quoted *In re Flanagan*, 415 B.R. 29, 42 (D. Conn. 2009), for the proposition that the acquiror from a trustee could “only prevail on its claims if, and to the extent that, the Trustee would have prevailed on those claims at the time of the assignment,” the Used Car Purchasers’ claims simply did not exist prior to the time they purchased their cars. In any event, *Flanagan* is inapposite, as it applied the wholly distinct rule that a trustee acting pursuant to 11 U.S.C. § 541 is subject to all of the same defenses as the debtor pre-bankruptcy and held that the trustee’s §

541 claims to recover assets was barred by *in pari delicto*. *Flanagan*, 415 B.R. at 33-34. To the same effect is *In re Magnesium Corp. of Am.*, 399 B.R. 722, 757-58 (Bankr. S.D.N.Y. 2009) (Gerber, J.) (dismissing Trustee’s § 541 claims against third parties on *in pari delicto* grounds because “the trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor”). The other authority relied on by the Bankruptcy Court, *In re KB Toys, Inc.*, 736 F.3d 247, 251-52 (3d Cir. 2013), is also off-point. *KB Toys* merely applied 11 U.S.C. § 502(d), which disallows “any claim of any entity” who received an avoidable transfer. *Id.* Because the transferor had a claim it knew to be disallowed, creating an incentive to sell bad claims was plainly contrary to the wording and purpose of 11 U.S.C. § 502(d). *See KB Toys*, 736 F.3d at 252. And, unlike here, there were no due process concerns at issue; indeed, the purchasers of the bad claims were on notice of the risks of purchasing a claim in bankruptcy, and could easily have learned the claims were avoidable by reading the debtors’ publically available filings. *Id.* at 254-55.<sup>16</sup>

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<sup>16</sup> The Bankruptcy Court erred in relying on *In re Old Carco LLC*, 492 B.R. 392, 403 (Bankr. S.D.N.Y. 2013) (“*Burton*”), for the proposition that the Used Car Purchasers’ claims were properly expunged by the Sale Order since “their predecessor (the previous owners of the vehicles) had a pre-petition relationship with [the debtor-manufacturer], and the design flaws that they now point to existed pre-petition.” Opinion, 529 B.R. at 571. But in *Burton*, the plaintiffs and their predecessors had knowledge of the design defects at issue given that a recall had

Finally, contrary to the Bankruptcy Court’s ruling, the Used Car Purchasers do not “assert that they have special rights—to assert claims for successor liability when nobody else can....” Opinion, 529 B.R. at 570. Rather, as discussed above, the Pre-Sale Purchasers who still own their cars should also be permitted to bring successor liability claims despite the Sale Order because their due process rights were violated.

**E. The Bankruptcy Court erred by finding that the Sale Order bars any Plaintiff’s direct claims arising exclusively from New GM’s violations of its own independent legal duties.**

The Bankruptcy Court found that, *only* as a remedy for the violation of the ISPs’ due process rights, could the ISPs assert “Independent Claims,” defined in the Judgment as “claims or causes of action asserted by the ISPs against New GM (whether or not involving Old GM vehicles or parts) that are based solely on New GM’s own, independent, post-Closing acts or conduct.” SPA-254, ¶ 4.

Inexplicably, however, the Bankruptcy Court held that Plaintiffs who purchased Old GM cars *without* the Ignition Switch Defect cannot bring Independent Claims unless they prove due process violations. *See* Judgment, SPA-254, ¶ 4; Form of Judgment Decision, 531 B.R. at 360 (Under the Opinion and Judgment, Old GM

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occurred. 492 B.R. at 403. In stark contrast, neither the Used Car Purchasers nor their predecessors were aware of the Ignition Switch Defect given Old and New GM’s intentional cover-up.

car purchasers cannot bring Independent Claims unless they show “that they were known claimants at the time of the 363 Sale, and that there was any kind of a due process violation with respect to them.”). This was plain error.

Assuming that the Sale Order was even intended to bar claims against New GM for its own conduct, such an injunction would extend beyond the jurisdiction of the Bankruptcy Court. Subject matter jurisdiction in a bankruptcy proceeding over third-party claims (such as the Plaintiffs’ Independent Claims) can extend only to actions affecting the *res* of the bankruptcy estate. *In re Johns-Manville Corp.*, 517 F.3d 52, 66-68 (2d Cir. 2008) (holding that, despite a “common nucleus of operative facts involving” the debtor and the insurer, bankruptcy order enjoining third-party claims against insurers predicated on insurer’s independent misconduct were unrelated to *res* of the estate and outside the scope of the bankruptcy court’s injunction power); *see also In re Quigley Co., Inc.*, 676 F.3d 45, 61-62 (2d Cir. 2012) (bankruptcy court lacks jurisdiction to enjoin a claim against a third party where such claim would not have an effect on the *res* of the bankruptcy estate).

While a bankruptcy court assuredly has jurisdiction to interpret and enforce its own orders, that ancillary jurisdiction exists only to the extent that the court has the jurisdiction to enter the order itself. *See Zerand-Bernal Grp. v. Cox*, 23 F.3d 159, 164 (7th Cir. 1994) (affirming the bankruptcy court’s holding that it “lacked

jurisdiction” to enjoin a post-363 sale claim against a non-debtor: “[T]he fact that the bankruptcy court, in the order approving the bankruptcy sale and later in the plan of reorganization, purported expressly to assume jurisdiction ... could not confer jurisdiction. A court cannot write its own jurisdictional ticket.”); *see also In re Johns-Manville Corp.*, 517 F.3d at 65 n.22 (“The ancillary jurisdiction courts possess to enforce their own orders ‘is itself limited by the jurisdictional limits of the order sought to be enforced.’”).

The Bankruptcy Court did not have subject matter jurisdiction to protect the non-debtor New GM by limiting the rights of any Plaintiffs to bring suit against New GM for New GM’s own post-Sale misconduct in breach of New GM’s own independent legal duties. Subject matter jurisdiction of bankruptcy courts is limited to “civil proceedings arising under Title 11, or arising in or related to cases under Title 11.” 28 U.S.C. § 1334(b). Because Plaintiffs’ Independent Claims are based solely on the non-debtor New GM’s post-Sale conduct, the claims cannot be said to “arise in” or “under” Title 11. *See Zerand-Bernal Grp.*, 23 F.3d at 162 (“arising under” jurisdiction “is limited to questions that arise during the bankruptcy proceeding and concern the administration of the bankrupt estate, such as whether to discharge a debtor”). And Plaintiffs’ claims are not “related to” Title 11, since the outcome of the Plaintiffs’ action can have no conceivable effect on

the bankrupt estate. *See In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992); *see also In re Quigley Co., Inc.*, 676 F.3d at 61-62 (bankruptcy court lacks jurisdiction to enjoin a claim against a third party where such claim would not have an effect on the *res* of the bankruptcy estate).

This Court should reject any argument that New GM should get immunity for its own post-Sale misconduct because immunity for the non-debtor increases the value of the estate. That a broad injunction against future claims against a purchaser might result in a buyer paying a higher price for assets in a 363 transaction is pure speculation, and in any event cannot confer jurisdiction over future claims against the purchaser arising from its independent misconduct. *See Zerand-Bernal Grp.*, 23 F.3d at 164 (rejecting the argument that bankruptcy courts may immunize a purchaser from state or federal law in the interests of increasing the value of a debtor's assets). As the *Zerand-Bernal Grp.* court reasoned, the argument that “the price received in a bankruptcy sale will be lower if a court is free to disregard a condition in the sale agreement enjoining claims against the purchaser based on the seller's misconduct” should be rejected because it “proves too much”:

It implies, what no one believes, that by virtue of the arising-under jurisdiction a bankruptcy court enjoys a blanket power to enjoin all future lawsuits against a buyer at a bankruptcy sale in order to maximize the sale

price; more, that the court could in effect immunize such buyers from all state and federal laws that might reduce the value of the assets bought from the bankrupt[.]<sup>[17]</sup>

There is no sound reason to encourage non-debtors to pay a purchase price in a 363 transaction that reflects a belief that they are forever immunized from liability for breaches of their *own* independent legal duties.

Thus, as this Court reiterated in *Manville IV*, 600 F.3d at 153, bankruptcy courts do not have jurisdiction to enjoin “claims against non-debtor third parties” where those claims are based on the non-derivative misconduct of the non-debtor and the claims do not impact the bankruptcy estate. *See also In re 1031 Tax Grp., LLC*, 2011 U.S. Dist. LEXIS 33755, at \*7 (S.D.N.Y. Mar. 29, 2011) (“federal courts are without jurisdiction to enjoin actions against third-parties not in bankruptcy when those actions are premised upon an ‘independent legal duty’”). Here, Plaintiffs’ claims are based on New GM’s fraudulent concealment of the scores of defects plaguing GM-branded vehicles; New GM’s culture, which systematically devalued safety; and New GM’s misrepresentations concerning the safety and reliability of GM vehicles—all in violation of New GM’s independent legal duties to refrain from unfair and deceptive trade practices. *See A-6347-7735*. A bankruptcy court simply does not have jurisdiction to enjoin such claims.

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<sup>17</sup> *Zerand-Bernal Grp.*, 23 F.3d at 163.

Accordingly, the Sale Order may not be read to bar **any** Plaintiff's' Independent Claims—and no Plaintiff need prove up a due process violation as a pre-requisite for bringing those claims.

**F. The Bankruptcy Court erred in applying the doctrine of equitable mootness to preclude recovery on Plaintiffs' claims.**

**1. The Bankruptcy Court erred by finding equitable mootness applicable to Plaintiffs' claims.**

Separate and distinct from Plaintiffs' claims against New GM, the Bankruptcy Court reviewed Plaintiffs' recovery potential on any claims they may have against the Old GM bankruptcy estate/GUC Trust. The Bankruptcy Court correctly found that Plaintiffs were prejudiced by the failure to receive constitutionally adequate notice of the Bar Date. *See* Opinion, 529 B.R. at 574. Likewise, it correctly found the appropriate remedy was to allow the Plaintiffs to seek to file late claims against the GUC Trust. *See id.* at 583. However, the Bankruptcy Court then erred by finding that, based on the doctrine of equitable mootness, in no event shall assets of the GUC Trust held at any time in the past, now, or in the future be used to satisfy any subsequently allowed claims of the Plaintiffs. *See id.* at 584, 598. The Opinion precludes Plaintiffs from obtaining any recovery from the Old GM estate and, therefore, the filing of late claims would be a fruitless endeavor. By applying equitable mootness as a complete block to



recovery on any allowed claims the Plaintiffs may be entitled to, the Bankruptcy Court abused its discretion.

Equitable mootness is a judge-made doctrine without constitutional footing. *See In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 143 (2d Cir. 2005). It is increasingly disfavored among the Circuits. *See, e.g., In re One2One Commc'ns, LLC*, No. 13-3410, 2015 WL 4430302, at \*7 (3d Cir. July 21, 2015) (Krause, J. concurring) (urging the Third Circuit to consider eliminating, or at the very least reforming, equitable mootness). Courts across the country identify it as an “exception” to their responsibility to exercise their jurisdictional mandate that must be used sparingly and construed narrowly. *See, e.g., In re One2One Commc'ns, LLC*, 2015 WL 4430302, at \*3-4.<sup>18</sup> It must be applied, if at all, with a scalpel rather than an axe. *See In re Charter Commc'ns, Inc.*, 691 F.3d 476, 482 (2d Cir. 2012).

The doctrine originated to prevent chaos if the requested relief would eviscerate a complex and fully consummated bankruptcy plan of reorganization. *See In re Chateaugay Corp.*, 10 F.3d 944, 952-53 (2d Cir. 1993); *see also In re Metromedia Fiber Network, Inc.*, 416 F.3d at 144. The doctrine was not developed

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<sup>18</sup> *Cf. Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 132 S. Ct. 1377, 1386 (2014) (disapproving of abstention doctrines as in tension with the federal courts' obligation to hear and decide cases).

as a complete bar to bankruptcy claims recoveries and has never been employed to thwart a creditor whose due process rights were violated. Indeed, there is no support to expand the disfavored doctrine to bankruptcy claims adjudication, particularly where a creditor has been deprived of due process.<sup>19</sup> Because any other conclusion would amount to an abuse of discretion, this Court should reverse the Opinion and remand to the Bankruptcy Court for adjudication of any late-filed claims by Plaintiffs. If such claims are allowed, the Bankruptcy Court can and should craft appropriate relief that balances the rights of Plaintiffs and the reasonable expectations of GUC Trust beneficiaries.

**2. The Bankruptcy Court erred by finding that Plaintiffs cannot satisfy three of the *Chateaugay* factors.**

Consideration of the prudential *Chateaugay* factors also demonstrates that the Bankruptcy Court abused its discretion. *See In re Chateaugay Corp.*, 10 F.3d

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<sup>19</sup> None of the cases cited by the Bankruptcy Court in support of its equitable mootness holding involved due process violations. All the cases cited by the Bankruptcy Court involve situations where the appellant either appeared in the proceedings or was provided adequate notice. Given that Plaintiffs were denied due process, the application of equitable mootness is itself inequitable and constitutes an abuse of discretion. *See In re Polycel Liquidation, Inc.*, 2007 WL 77336, at \*2-8 (D.N.J. Jan. 8, 2007) (affirming bankruptcy court's determination that equitable and statutory mootness did not require dismissal of Rule 60(b)(4) motion for relief from sale order where appellant had no notice of the sale motion); *In re Motors Liquidation Co.*, 428 B.R. 43, 57 n.18 (Bankr. S.D.N.Y. 2010) (noting in *dicta* that "due process concerns render[] mootness and *res judicata* doctrines inapplicable").

at 952-53. Plaintiffs meet all five *Chateaugay* factors and the Bankruptcy Court erred by holding that Plaintiffs cannot satisfy three of the five factors. *See* Opinion, 529 B.R. at 592.<sup>20</sup>

Without adequate notice to the ISPs, Old GM's chapter 11 plan of liquidation was confirmed; the Plan provided equal treatment for allowed claims of the same priority. A-3890-3985. Years later, a Late Claims Order was entered to efficiently manage the influx of late claims. A-4809-10. The Late Claims Order expressly stated that nothing in the order shall prevent any claimant from seeking to have its late claim deemed timely filed. A-4810.

Likewise, the Plan, Confirmation Order and GUC Trust Agreement do not prohibit or prejudice late-filed claims. A late proof of claim may be subsequently adjudicated as an Allowed General Unsecured Claim. *See* Plan § 1.79, A-3914. Indeed, both before and after the Plan Effective Date, late proofs of claim against

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<sup>20</sup> These five factors are: (i) the court can still order some effective relief; (ii) such relief will not affect “the re-emergence of the debtor as a revitalized corporate entity”; (iii) such relief will not unravel intricate transactions so as to “knock the props out from under the authorization for every transaction that has taken place” and “create an unmanageable, uncontrollable situation for the Bankruptcy Court”; (iv) the “parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings;” and (v) the appellant “pursue[d] with diligence all available remedies to obtain a stay of execution of the objectionable order ... if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.” *In re Chateaugay Corp.*, 10 F.3d at 952-53.

the Old GM estate were deemed timely filed, and subsequently allowed. *See* Opinion, 529 B.R. at 537. Those creditors received equal treatment under the Plan as all other Allowed General Unsecured Creditors. *See* Plan § 4.3, A-3928.

Both before and after consummation of the Plan, sophisticated investors bought and sold claims against Old GM and GUC Trust Units. They were keenly aware of the prospects of late-filed claims and dilution of recoveries. Unitholders were aware that supplemental distributions to them were only appropriate under Section 6.2(l) of the Plan “to the extent there are sufficient assets available for distribution,” and then at the “appropriate amount.” *See* Plan § 6.2(l), A-3948. Further, it was common market knowledge that under the GUC Trust Agreement, the GUC Trust Administrator is required to consider previously unknown potential Allowed General Unsecured Claims when assessing whether distributions to Unitholders should be made. *See* GUC Trust Agreement § 5.4(d), A-4583.

Against this backdrop, Plaintiffs’ potential distributions would ordinarily be a function of past, present and future GUC Trust Assets. As of the Opinion, the Old GM estate and the GUC Trust had distributed GUC Trust Assets valued at approximately \$9 billion<sup>21</sup> (the “Past GUC Trust Assets”) to Allowed General

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<sup>21</sup> By March 31, 2015, the GUC Trust distributed 137,330,625 shares of New GM common stock, 124,846,071 Series A warrants, 124,846,071 Series B warrants and \$3,354,600 in cash on behalf of resolved allowed general unsecured claims

Unsecured Creditors and Unitholders holding aggregate Allowed General Unsecured Claims of approximately \$32 billion, for recoveries of roughly 28 cents on the dollar. *See* A-10927-944. As of the Opinion, the GUC Trust held assets not yet distributed worth approximately \$945 million (the “Remaining GUC Trust Assets”). A-10930.

Finally, the GUC Trust Assets stand to be augmented upon allowance of Plaintiffs’ claims against the GUC Trust through an “Accordion Feature” in the Sale Agreement. *See* Sale Agreement § 3.2(c), A-1699-1700. Under the Accordion Feature, New GM must provide additional consideration in the form of additional shares of stock if the aggregate amount of Allowed General Unsecured Claims exceeds \$35 billion. *See id.*<sup>22</sup> If the aggregate value of Allowed General Unsecured Claims reaches \$42 billion, New GM would be required to contribute the full value available pursuant to the Accordion Feature, which is 30 million

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and units. *See* A-10931. Valuing the initial distribution based on the price of New GM common stock and warrants at the time of the initial distribution, and the remaining distributions based on the historical average price of New GM common stock and warrants, approximately \$9 billion in GUC Trust Assets had been distributed at the time of the Opinion.

<sup>22</sup> As of March 31, 2015, the aggregate value of Allowed General Unsecured Claims is approximately \$32 billion. *See* A-1029-42. Based on the claims resolved to date, and the one disputed \$20 claim that is still pending, the Allowed General Unsecured Claims will not reach \$35 billion without Plaintiffs’ claims.

shares of New GM Common Stock, worth approximately \$1.029 billion as of market-close on November 13, 2015 (the “Accordion Feature Value”).<sup>23</sup>

Without adverse impact on Unitholders, Plaintiffs could receive exclusive access to any Accordion Feature Value. In addition, the Remaining GUC Trust Assets could be earmarked to satisfy Plaintiffs’ subsequently allowed claims. Even if the entire balance of the Remaining GUC Trust Assets went to satisfy \$10 billion of allowed claims, Plaintiffs would obtain materially less than similarly situated creditors received from the GUC Trust.<sup>24</sup> Finally, Past GUC Trust Assets conceivably could be clawed back and reallocated, especially from known Unitholders.<sup>25</sup> The Bankruptcy Court failed to appropriately consider the above facts and its ability to effectively fashion relief for Plaintiffs. The result was an

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<sup>23</sup> Plaintiffs seek approximately \$7-\$10 billion in damages. Opinion, 529 B.R. at 521. If claims against the GUC Trust were allowed in that amount, those claims would push the overall amount of Allowed General Unsecured Claims over the \$35 billion level and could trigger all or substantially all of the Accordion Feature Value.

<sup>24</sup> Plaintiffs would obtain approximately nine cents on the dollar as compared to a recovery for other similarly situated creditors of approximately 28 cents on the dollar.

<sup>25</sup> Were the Plaintiffs’ claims to be allowed at \$7 billion, fashioning relief for the Plaintiffs with Accordion Feature Value and Remaining GUC Trust Assets would likely obviate the need to claw-back any distributions of Past GUC Trust Assets. It would closely approximate the equal treatment of similarly situated creditors that is the hallmark of the Bankruptcy Code. *See Begier v. Internal Rev. Serv.*, 496 U.S. 53, 58 (1990).

abuse of discretion, a holding despite clear precedent to the contrary, that Plaintiffs could not meet three of the *Chateaugay* factors. *See* Opinion, 529 B.R. at 592.

**a. The Bankruptcy Court misapplied the first *Chateaugay* factor.**

The first *Chateaugay* factor looks to whether “at least some effective relief could be granted.” *In re Chateaugay Corp.*, 10 F.3d at 954. The Second Circuit has recognized that “[a] claimant should not be out of court on grounds of mootness solely because its injury is too great for the debtor to satisfy in full.” *Id.* Contrary to the Bankruptcy Court’s holding, it would be neither inequitable nor impossible for the Bankruptcy Court to fashion relief for the Plaintiffs with regard to either the (i) Accordion Feature Value; (ii) Remaining GUC Trust Assets; and/or (iii) Past GUC Trust Assets.

The Opinion’s misreading of Plan documents separately warrants reversal. The Plaintiffs may file late proofs of claim. *See* Opinion, 529 B.R. at 598. Those claims may be allowed and Plaintiffs adjudicated as holders of Allowed General Unsecured Claims under the Plan. *See* Plan § 1.79, A-3914. As holders of Allowed General Unsecured Claims, Plaintiffs would be entitled to distributions of GUC Trust Assets in the same percentage as other Allowed General Unsecured Creditors under the Plan and Bankruptcy Code. *See* Plan § 4.3, A-3928-29; 11 U.S.C. § 726. Accordingly, relief can be afforded to Plaintiffs against GUC Trust

Assets without modifying the Confirmation Order or unraveling the Plan.

Therefore, Plaintiffs meet the first *Chateaugay* factor.

**b. The Bankruptcy Court misapplied the third *Chateaugay* factor.**

The Third *Chateaugay* factor asks whether the relief would inequitably impact third parties. *See In re Chateaugay Corp.*, 10 F.3d at 953. In an abuse of discretion, the Bankruptcy Court found that granting Plaintiffs relief would “knock the props out” from the transactions under which Units were acquired. *See* Opinion, 529 B.R. at 587-88. Because there is no support for this conclusion it requires reversal.

The Bankruptcy Court found that purchasers of Units based their expectations on the then-known universe of claims and the assumption that those claims could only go down via subsequent claim objections. *See id.* at 587. The Bankruptcy Court did not discuss how this unsubstantiated expectation, even if true, impedes providing Plaintiffs relief via the Accordion Feature Value. Since the Accordion Feature Value only comes into play upon allowance of Plaintiffs’ claims, Unitholders did not have any expectations about this value to dash. Accordingly, the Bankruptcy Court’s conclusion that Plaintiffs cannot meet the third *Chateaugay* factor was an abuse of discretion at least as it pertains to the Accordion Feature Value.



The Bankruptcy Court also erroneously found that Unitholders had a reasonable expectation that the total universe of claims filed against Old GM would not increase. *See id.* at 587-89. That conclusion is without basis and the evidence cuts directly against it. Late claims against the GUC Trust have been allowed and have tapped GUC Trust Assets for recoveries. *See id.* at 537. Thus, Unitholders were well aware of the risk of dilution by late-filed claims that are subsequently allowed. Section 6.2(l) of the Plan provides recoveries to Unitholders only “to the extent there are sufficient assets available for distribution,” and then only for an “appropriate amount.” *See* Plan § 6.2(l), A-3944. Upon disclosure of the Ignition Switch Defect, Unitholders were well aware of potential dilution by Plaintiffs’ claims. *See* Opinion, 529 B.R. at 537. The GUC Trust Administrator disclosed in its SEC filings as early as May 16, 2014 that Plaintiffs’ claims could impact Unitholders’ recoveries. *See* A-13791-95.

The Bankruptcy Court strained *BGI II* to find that Plaintiffs did not meet the third *Chateaugay* factor. *BGI II* is inapplicable since the tardy creditors there had notice, but did not object to the bar date or plan. *See BGI II*, 772 F.3d at 106, 110-11. The subject creditors’ appeal was found to be equitably moot. *See id.* Unlike *BGI II*, the Plaintiffs here suffered a violation of their due process rights and the Bankruptcy Court found that the appropriate remedy was filing late proofs of

claim. *See* Opinion, 529 B.R. at 574, 583, 598. Additionally, allowing the late proofs of claim in *BGI* would have eviscerated recoveries to all other general unsecured creditors. *See In re BGI, Inc.*, 2013 WL 10822966, at \*7-8 (S.D.N.Y. May 22, 2013) (“*BGI I*”), *aff’d*, 772 F.3d 102 (2d Cir. 2014). Here, at a minimum, Plaintiffs could receive exclusive access to the Accordion Feature Value without *any* dilution of other creditors’ recoveries. In *BGI II*, allowing the class of gift card holders to file late claims and access the remaining \$61 million in the estate would have had a disastrous effect on distributions under the Plan because *BGI II* unsecured creditors were projected to receive as little as four cents on the dollar and would be entirely swamped by the gift card class’ claims of about \$210 million. *See BGI II*, 772 F.3d at 105 n.2, 110 & n.15. Allowing Plaintiffs to recover from Current GUC Trust Assets (realizing approximately 13 cents on the dollar if all Remaining GUC Trust Assets were made available to Plaintiffs and their claims are allowed at \$7 billion) will not reduce recoveries to Allowed General Unsecured Creditors (who will retain payment of 28 cents on the dollar). Even clawing back Past GUC Trust Assets would not have the “disastrous effect” at issue in *BGI*.

Finally, the Bankruptcy Court found that class litigation should not delay distributions to other creditors and that Unitholders would be prejudiced even if

Plaintiffs' claims were ultimately disallowed. *See* Opinion, 529 B.R. at 589.

There is no support for this conclusion. Filing class proofs of claim in bankruptcy is commonplace. Adjudicating the bona fides of a late-filed claim under the *Pioneer*<sup>26</sup> factors (including class proofs of claim) is not an unmanageable situation and should not cause undue delay. In fact, aside from the \$135 million distribution by the GUC Trust anticipated in November 2015, the GUC Trust does not anticipate distributing any other Remaining GUC Trust Assets until November 2016.

**c. The Bankruptcy Court misapplied the fifth *Chateaugay* factor.**

The fifth *Chateaugay* factor considers whether an appellant pursued a stay of the objectionable order with diligence. *See In re Chateaugay*, 10 F.3d at 953. As a threshold matter, the Bankruptcy Court erred applying this *Chateaugay* factor because the Plaintiffs are not seeking a stay of any order and thus by its terms this factor is inapplicable. The Plaintiffs were not provided constitutionally adequate notice and were deprived of the ability to seek a stay of the Sale, Bar Date or Confirmation Orders. The Ninth Circuit has found that where a party has done nothing by its own inactions to encourage or permit developments to proceed

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<sup>26</sup> *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

without its participation, courts should be cautious about reaching a conclusion of equitable mootness. *See In re Thorpe Insulation Co.*, 677 F.3d 869, 881 (9th Cir. 2012). This Court should likewise determine that the Bankruptcy Court abused its discretion in considering the fifth *Chateaugay* factor.

Even if this Court finds the fifth *Chateaugay* factor applicable, the Bankruptcy Court abused its discretion by finding that Plaintiffs did not pursue relief with diligence. *See* Opinion, 529 B.R. at 590-92. The Bankruptcy Court erred in focusing its analysis solely on the GUC Trust's November 2014 distribution which amounted to 2.45% of total Old GM estate value distributed. *See id.*

The Bankruptcy Court abused its discretion because Plaintiffs have pursued their claims with diligence. The Plaintiffs promptly filed suits following disclosure of the Ignition Switch Defect. *See id.* at 538. They immediately contested New GM's Motion to Enforce Sale Order, filing an objection the day after its filing. *See Objection to Motion of General Motors LLC Pursuant to 11 U.S.C. §§ 105 and 363 to Enforce the Court's July 5, 2009 Sale Order and Injunction, In re Motors Liquidation Co.*, No. 09-50026 (REG) (Apr. 22, 2014), ECF No. 12629. The Plaintiffs have actively participated in the Bankruptcy Court's case conferences.

The GUC Trust Administrator has disclosed the risk of Plaintiffs' claims diluting and delaying GUC Trust distributions. *See, e.g.*, A-13791-98.

Indeed, within a week of the GUC Trust's disclosure that it intended to make the November 2014 distribution and well in advance of the distribution, Plaintiffs sent counsel for the GUC Trust Administrator a letter advising that Plaintiffs were known contingent beneficiaries of the GUC Trust and reserves should be established for their claims before any further distributions. A-10360-62. Under Section 5.4(d) of the GUC Trust Agreement, the GUC Trust Administrator was required to consider the Plaintiffs' claims prior to making the November 2014 distribution. A-4583. Undeterred, the GUC Trust Administrator made that distribution in contravention of the GUC Trust's governing documentation. *See Id.* Under the May 16, 2014 Scheduling Order, the Plaintiffs have until final determination of the Threshold Issues to file claims against the GUC Trust and can still seek to clawback the November 2014 and other distributions of Past GUC Trust Assets. A-5691. Accordingly, the Bankruptcy Court abused its discretion in finding that Plaintiffs should have done more than they have, and are consequently shut out of GUC Trust Assets.

## **VII. CONCLUSION**

The ISPs respectfully request that this Court reverse the Bankruptcy Court's Opinion and Judgment finding that (i) the Pre-Sale Plaintiffs and the Used Car Purchasers cannot bring successor liability claims even though their due process rights were violated; (ii) Plaintiffs' Independent Claims against New GM cannot proceed unless they show a due process violation; and (iii) the Pre-Sale Plaintiffs are barred by the doctrine of equitable mootness from recovering against the debtor's estate.

Dated: November 16, 2015

Respectfully submitted,

By: /s/ Steve W. Berman

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## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C), the opening brief is proportionally spaced, has a typeface of 14 points and contains 13,824 words (excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance). In preparing this Certificate, I relied on the word-count program of Microsoft Word 2010.

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# Exhibit 5

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 - - - - - x

4 In the Matter of:

5 Chapter 11

6 MOTORS LIQUIDATION COMPANY, Case No.: 09-50026 (REG)

7 et al, f/k/a General Motors (Jointly Administered)

8 Corp., et al.,

9

10 Debtors.

11 - - - - - x

12 STEVEN GROMAN, ROBIN DELUCO,

13 ELIZABETH Y. GRUMET, ABC

14 FLOORING, INC., MARCUS

15 SULLIVAN, KATELYN SAXSON, Adv. Pro. No.:

16 AMY C. CLINTON, AND ALLISON 14-01929 (REG)

17 C. CLINTON, on behalf of

18 themselves, and all other

19 similarly situated,

20 Plaintiffs,

21 v.

22 GENERAL MOTORS LLC,

23 Defendant.

24 - - - - - x

25

1 U.S. Bankruptcy Court  
2 One Boling Green  
3 New York, New York  
4

5 May 2, 2014

6 9:46 AM  
7

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9 B E F O R E :

10 HON ROBERT E. GERBER

11 U.S. BANKRUPTCY JUDGE  
12

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14 Hearing re: Status Conference  
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1 P R O C E E D I N G S

2 THE COURT: Good morning, have seats, please. I  
3 know most of you at the counsel table. Mr. Steinberg, with  
4 you is whom?

5 MR. STEINBERG: With me is -- well, you can  
6 introduce yourself.

7 MR. GODREY: Richard Godfrey, Your Honor.

8 MR. STEINBERG: From Kirkland.

9 THE COURT: Mr. Godfrey? Okay. Thank you.

10 MR. GODREY: Good morning, Your Honor.

11 THE COURT: I know Mr. Weisfelner, Mr. Inselbuch,  
12 Mr. Esserman, and Mr. Flaxer. As others want to be heard  
13 I'll give them that opportunity as we go along.

14 Within limits I'm going allow parties to be heard  
15 as they see fit, but I have some preliminary comments.

16 I haven't read all 3,500 pages of the filings that  
17 have come in in the last ten days, but I've read New GM's  
18 motion, Mr. Flaxer's complaint, Mr. Weisfelner's objection,  
19 and have also read all of counsel's letters and the various  
20 proposed agenda items.

21 I think I have a pretty decent handle on the  
22 issues that are going to need to be addressed today and the  
23 issues that are going to need to be addressed in the  
24 upcoming several months, but I'm less clear as to the extent  
25 to which all of the issues are already on the table.

1           Identifying the issues that are going to need to  
2       be teed up for judicial determination, or more exactly  
3       figuring out how and when they're going to be put on the  
4       table, is one of the primary purposes of the conference  
5       today.

6           I think everybody understands or should that today  
7       is not the day to argue the merits of any of your respective  
8       positions or especially calling either side names. It's  
9       instead to, as I said, identify the issues that need to be  
10      addressed and to establish a fair means for getting the  
11      issues judicially determined.

12          I appreciate the efforts of Mr. Steinberg and  
13      Mr. Weisfelner and Mr. Inselbuch, Esserman, and Flaxer in  
14      conferring before we got here to avoid inefficiencies and to  
15      set up the orderly process for teeing these issues up. You  
16      got pretty far and I'll take care of the rest.

17          As you'll hear momentarily I have a number of  
18      tentatives, as that expression is used in California and  
19      elsewhere in the Ninth Circuit, which are my inclinations as  
20      to how to proceed, subject to your rights to be heard, but I  
21      have some expectations as to an orderly discussion, no  
22      histrionics, no repetition. I also have some questions and  
23      concerns that I want you to address when it's your turn.

24          Starting with my questions.

25          I gather there are now about 60 class actions and

1 a couple of individual actions pending against New GM in  
2 various parts of the country with respect to the ignition  
3 switches in some way, but I have only a partial  
4 understanding of what the claims typically characterized as  
5 for economic loss are.

6 I'd understood, rightly or wrongly, that New GM  
7 voluntarily assumed liability for wrongful death, personal  
8 injury, and property damage with respect to any "incidents  
9 or occurrences," which I understood to be things like wrecks  
10 or fires or of course death or injury, that took place after  
11 the sale in July of 2009.

12 I also understood that New GM had undertaken  
13 responsibility for satisfying the glove box warranty and for  
14 complying with state lemon laws.

15 But I need to get a handle on what's left. What  
16 is left that has engendered 60 class actions across the  
17 country? And obviously I'll hear your respective views on  
18 that. I got a pretty good sense of the legal theories that  
19 were invoked, vis-à-vis that economic loss, but I still  
20 don't understand exactly what we're talking about.

21 Mr. Inselbuch's April 24th letter identifies an  
22 issue as to whether claims against New GM, statutory or  
23 otherwise, based on post-sale conduct of New GM are subject  
24 to my orders. Mr. Esserman's April 23rd letter and  
25 Mr. Weinberg's -- I don't see Mr. Weinberg, is he here

1 somewhere? Oh, yeah there is he, okay. April 30 letters  
2 raise whey I understand to be the same issue.

3 To what extent, and I guess this is mainly for  
4 you, Mr. Steinberg, is there a dispute on that? Or is the  
5 devil in the details turning on the whether the alleged  
6 wrongful conduct is wholly past sale or there's some other  
7 nuance that would make the question harder than it would  
8 appear at first blush? Help me get a better handle on what  
9 we're talking about in that regard.

10 A similar issue exists with respect to the lemon  
11 laws as mentioned in Mr. Esserman's April 23rd letter.  
12 Please address that as well.

13 Next, each of the Steinberg and Weisfelner letters  
14 talk about getting a sense as to how the majority of the  
15 class action plaintiffs are prepared to proceed. I  
16 underscore the word majority. When each of you use that  
17 term it suggested to me, rightly or wrongly, that the  
18 plaintiffs referred to were less than all of them. I think  
19 what you were able to accomplish was very, very helpful, but  
20 have some difficulty in seeing how that by itself would get  
21 me across the goal line.

22 The fact that all plaintiffs couldn't get behind  
23 three law firms -- and on this limited issue I think I can  
24 take judicial notice -- have some proven track record in  
25 addressing the interface between tort liability and

1 bankruptcy law causes me some concern. Because as I said, I  
2 don't want repetition, and that includes making the same  
3 point in different ways. I need to hear from anybody who  
4 thinks those three firms aren't good enough why that's so,  
5 or conversely why they're not raising issues that need to be  
6 addressed. That's not to say that anybody who thinks up  
7 anything those firms couldn't can't be heard, but I need to  
8 know why and what's the problem.

9 I also want to hear from Mr. Flaxer, since he was  
10 the first and he was the only one that brought an adversary,  
11 and I don't put him in the category that I put all the  
12 others.

13 Next, Mr. Esserman speaks in his April 23rd  
14 letter, paragraph 5, of teeing up procedures for plaintiffs.  
15 I don't know if this is the class action plaintiffs he  
16 represents or all prospective plaintiffs, to show cause  
17 whether they have any claims against New GM not otherwise  
18 barred by the sale order and injunction.

19 You wrote that letter, Mr. Esserman, back on  
20 April 23rd and I gather you've had discussions with other  
21 folks since that time. I'd like you or Mr. Weisfelner, let  
22 me know whether you have any needs and concerns to get  
23 rulings on this that haven't been subsequently rolled into  
24 what needs to be addressed, and I'd like to ask the same  
25 with respect to the item you listed as number 7 in your

1 letter, procedures under which, assuming the sale order  
2 stands without modification, under which plaintiffs might  
3 seek amendments to it.

4 Okay, now for my tentatives. I apologize to you  
5 all for speaking at such length.

6 As I said these are California tentatives, which  
7 are views I formed on a preliminary basis after reading the  
8 briefs and the letters but which are subject to your rights  
9 to be heard and which I'll obviously consider in the way of  
10 modifications based on whatever you tell me verbally.

11 First. Now that fraud on the Court has been taken  
12 off the list of threshold issues I'm not sure if there's a  
13 material difference in views or for that matter any  
14 difference in views on the threshold issues that need to be  
15 addressed at least insofar as the majority of the plaintiffs  
16 are concerned.

17 I'm inclined to consider as threshold issues the  
18 two remaining issues that were shown on Mr. Weisfelner's  
19 black line, and I'm also amenable and inclined to allow any  
20 other purely legal issues to be raised along with the so-  
21 called threshold issues, such as the discrimination  
22 argument, that is the argument that creditors with personal  
23 injury claims, death claims, property claims would be  
24 addressed by New GM whereas those with the so-called  
25 economic damage claims would not.



1           It seems to me, again subject to your rights to be  
2       heard, that the more appropriate means of demarcation  
3       between claims that can and should be considered as  
4       threshold issues and those that can be put and should put to  
5       a later time is to separate issues that can be addressed  
6       without discovery from those that can only be addressed with  
7       discovery and potentially a very burdensome or at least  
8       lengthy discovery process.

9           The principal players as I read the letters, New  
10       GM and the class action plaintiff steering committee seem to  
11       feel that they can win without discovery, and whether or not  
12       either side is right in that regard that seems to me, that  
13       is to deal with issues without discovery, to be the logical  
14       place to start since even if issues need to be further  
15       addressed or refined the early work that's accomplished  
16       would set the table for the work, if any, that needs to be  
17       considered next.

18           The corollary of that would seem to be that I need  
19       to reject the contentions of a couple of you, and I'm  
20       thinking of Mr. Esserman, your first -- your April 23rd  
21       letter and Mr. Etkin's April 30 letter, that we should now  
22       have discovery, and as I read your early letter,  
23       Mr. Esserman, what would seem to be pretty massive discovery  
24       early on and that such discovery should proceed on an  
25       expedited basis.

1           Once again I note that you, Mr. Esserman, are a  
2       member of the steering committee and your views may have  
3       evolved since April 23rd when you wrote that early letter.

4           Two. My tentative is not to interfere with the  
5       MDL's hearing now scheduled for May 29th, I think that's the  
6       date, and to permit the judicial panel and multidistrict  
7       litigation to rule on where pretrial proceedings with  
8       respect to any future litigation should proceed, but that  
9       would be under the understanding, at least under my  
10      understanding -- that's why I wanted you guys to be heard on  
11      it -- that everyone understands that to the extent I  
12      hereafter rule in a way that some or more than some of those  
13      now pending litigations before the MDL panel need to be put  
14      on hold or stopped in some other fashion, that I would be  
15      free to do that, including vis-à-vis, the multidistrict  
16      panel irrespective of what the MDL panel had accomplished up  
17      to that point in time.

18           Three. I share your view that anyone who's  
19      unwilling to agree to a temporary standstill that the  
20      majority seems to agree upon should come forward within a  
21      time certain either on the date that's already proposed,  
22      which I think was May 10, or some alternate date. More  
23      likely close to that, but if fairness requires a little more  
24      time that to my thinking would be okay.

25           Reading the submissions so far it's obvious that

1       these are serious issues, and my general view -- call it a  
2       tentative or not -- is that rushing by a few days or even a  
3       few weeks on issues of this importance isn't in anybody's  
4       interest.

5               Fourth. I think we need to ascertain by a date to  
6       be agreed upon or set all of the issues that are on the  
7       table or that are to be decided even if they're not  
8       addressed as what I call Phrase I issues. I need your  
9       recommendation as to the best way to do that, and what  
10      deadline I should impose for parties to get their  
11      contentions on the table.

12             That wouldn't necessarily mean that they should  
13      all be briefed at that early time, and in fact my  
14      expectation would be that they wouldn't be, but I want to  
15      get the lay of the land on the issues that I'm going to be  
16      asked to rule upon.

17             Related to that was Mr. Flaxer's suggestion that a  
18      date should be set by which any and all interested parties  
19      should commence adversaries similar to the one he brought if  
20      they were of a mind to. My tentative is to agree with  
21      Mr. Flaxer's point in that regard.

22             Fifth. I want to accomplish as much as we can  
23      before we get bogged down in discovery. I like the idea of  
24      you guys agreeing on a stipulated record, but I don't like  
25      the variant of that, which I think was proposed by

1 Mr. Weisfelner, which was request for admissions. If things  
2 would be admitted they'd be stipulated to, and if they're  
3 not admitted they're going to result in disputed issues of  
4 fact as to which we're going to have to come up with some  
5 other mechanism, and Rule 35 requests for admissions is  
6 really nothing more than a cost shifting device any way.

7 So I want you guys when the time comes to really  
8 try to agree on everything you can agree upon consistent  
9 with your professional responsibilities and then identify  
10 issues as to which you agree to disagree and I'll decide  
11 then what to do about it.

12 Six. We have one adversary proceeding on file and  
13 one contested matter. Other adversaries may be filed  
14 consistent with the point Mr. Flaxer made, but at this point  
15 I have these two, we need to think about the possibility of  
16 more.

17 My tentative to consolidate the contested matter  
18 and any adversaries for procedural purposes. Mr. Steinberg,  
19 your letter cited decisions by Judge Lifland and Judge  
20 Walrath indicating pretty clearly holding that when you're  
21 enforcing an earlier court order you don't need to bring an  
22 adversary to do that, but many observers might agree with  
23 the judgment that Mr. Flaxer presumably made that when he  
24 wanted a declaratory judgment and he wanted some of the  
25 stuff that he asked for in there an adversary proceeding was

1 appropriate.

2 I guess the issue is whether others who are  
3 looking for things similar to what Mr. Flaxer did would need  
4 to either climb onto his adversary or bring their own  
5 adversaries. It might be appropriate for separate  
6 adversaries to be brought, although my thought would be that  
7 they would be procedurally consolidated and jointly  
8 administered as well, but I need people to focus on that.

9 If those adversaries are to be brought -- and many  
10 might regard that as a good idea, but I'm not forming a  
11 tentative on that -- Mr. Flaxer's point that it should  
12 happen by a fairly early date certain seems to me to be  
13 pretty persuasive. But again, that's a tentative.

14 Seven. While these issues mainly involve New GM  
15 some also appear to also involve Old GM or the GUC Trust,  
16 the general unsecured creditors trust, that's Old GM's  
17 successor.

18 It would seem to me that there's an issue as to  
19 whether there might be excusable neglect to file late claims  
20 against Old GM to the extent that I ruled that any of the  
21 claims being asserting are prepetition claims rather than  
22 post-petition claims if the ability to assert those claims  
23 wasn't known by the time that the Old GM case bar date  
24 expired.

25 When I was preparing for today I speculated that

1 issues of that character were why Mr. Golden wanted to have  
2 the opportunity to be heard.

3 To the extent any issues involving Old GM or the  
4 GUC Trust can be heard as matters of law my tentative is  
5 that they should be considered along with the other  
6 threshold issues and that anybody who cares about those  
7 kinds of issues should have a chance to weigh in on them.

8 Lastly, eight. In his April 24th letter  
9 Mr. Flaxer raised the issue of mediation. Obviously the  
10 idea or the prospect of meeting the two sides needs and  
11 concerns without this monstrous battle is attractive to me.

12 When I was a practicing lawyer a district judge in  
13 Delaware, Joe Farnan, some of you may know him, made an  
14 impression on me and I think a bunch of other lawyers when  
15 he said that the guy in the robe would do his job but  
16 parties' needs and concerns could be better addressed by  
17 negotiation than by forcing a judge to decide issues within  
18 the four corners of what judges are allowed to decide.

19 And frankly it would be great if whatever money is  
20 available for injured people could go to them and not to  
21 litigation costs and attorneys' fees. I have no tentative  
22 on this, but I want people to address it by the time they're  
23 done.

24 So we're ready to continue. Mr. Steinberg, I'm  
25 going hear from you first, then Mr. Weisfelner, then from

1 anybody who has any non-repetitive remarks to make after  
2 that. Oh, Mr. Flaxer, can I hear from you, please, after I  
3 hear from Mr. Weisfelner if you care to be heard.

4 Mr. Steinberg.

5 MR. STEINBERG: Thank you very much, Your Honor,  
6 and thank you for the careful consideration of the issues  
7 that have been presented.

8 I'd like to be able to address the tentatives and  
9 then go back to the questions and then maybe find the script  
10 that I had started in connection with this hearing.

11 Your Honor had identified the demarcation for  
12 threshold issues as that which could be done with either no  
13 discovery or very little discovery versus something that  
14 would lead to much more complex discovery, and we agree that  
15 that is a proper formulation.

16 The one thing that we would ask Your Honor to  
17 consider, and I understand the balance here, is that we had  
18 suggested as well as I think Mr. Flaxer, that fraud on the  
19 Court would be a threshold issue.

20 Generally we were lumping all the Rule 60 issues  
21 together, and many times when someone argues 60(d)(1), which  
22 is whether there's an equitable remedy that should be  
23 fashioned, or even the 610(b)(4), which is the procedural  
24 due process, they usually throw in 60(d)(3), which is the  
25 fraud on the court, whether it's proper or not, but that's

1 -- but they assert those in. And so I understand that fraud  
2 on the Court may require some additional discovery, but the  
3 issue is how much additional discovery and should it be  
4 considered as well as a threshold issue?

5 THE COURT: You read my mind, Mr. Steinberg,  
6 because when I thought about fraud on the Court in trying to  
7 put myself in the role of a plaintiff's lawyer then I would  
8 have thought that the plaintiff's lawyer would want to get  
9 into GM's files or communications to ascertain the extent to  
10 which behind the scenes Old GM was thinking about this  
11 liability and not making a disclosure to me. You think  
12 that's only modest discovery or can be limited in that  
13 fashion or were you thinking about a different kind of  
14 discovery that might be undertaken, vis-à-vis, that issue?

15 MR. STEINBERG: Well the issue about whether the  
16 Old GM professionals or the people in charge of negotiating  
17 the MSPA or the people in charge of presenting evidence to  
18 Your Honor, that would be a fairly discreet time period. I  
19 mean the bankruptcy was filed on June 1, the order approving  
20 the sale was July 5. So we don't think that necessarily the  
21 discovery from a time span is as significant. We're also  
22 fairly confident what the result would be of that -- of any  
23 of that type of discovery.

24 But, Your Honor, as you outline the issue if the  
25 choice that we had was to effectively piecemeal the 60(d)(3)



1 issue and the trade off would be a much more streamline  
2 procedure to present the legal issues -- so either there'd  
3 be no discovery or very, very little discovery -- that may  
4 be something that we're prepared to do, because we  
5 understand the logic of that. And though it's piecemealing  
6 a Rule 60 issue it may make sense under the circumstances to  
7 be able to present as many of the pure legal issues as  
8 possible.

9 I probably would need, and I'm sure this side of  
10 the table probably needs the opportunity to talk to their  
11 other people as well too to see whether they agree with my  
12 formulation, but I certainly understand the logic of it and  
13 if there was an agreement that there would be little or no  
14 discovery and we would just try to stipulate as much as we  
15 could to a stipulated record that may be a good avenue to go  
16 forward.

17 Your Honor, in trying to address one of your other  
18 tentatives, because I think it ties into a number of  
19 different issues, you'll see that -- that in our agenda  
20 letter we had said that the people who brought the adversary  
21 proceeding could file an amendment to the complaint by  
22 May 14th, provided that it doesn't object to the substance  
23 of what we agree to as the procedure going forward today.  
24 So if they want to restate what they think their claims are  
25 and perhaps try to make sure that it was more inclusive of

1 other people then that's fine.

2 And you see that in Mr. Weisfelner's letter that  
3 he talked about filing an amended complaint in the -- in the  
4 MDL action as a procedural issue, which we don't think is a  
5 procedural issue, we actually think it's a substantive  
6 issue. But both things -- both of those issues evolve  
7 around one of the tentative --

8 THE COURT: Forgive me, Mr. Steinberg, I lost you  
9 there. I thought you said filing an amended complaint in  
10 the MDL action. I thought that my only connection with the  
11 MDL action is I guess I have the power to put it on hold,  
12 but what else do I have to do with the MDL action?

13 MR. STEINBERG: No, Your Honor, I was trying to  
14 lead to a point, but I was merely saying that there was a  
15 point of disagreement in the letters as to whether the  
16 agreement to allow them to go forward on the May 29th  
17 hearing and that it wouldn't be stayed and that it would be  
18 for purely administrative matters, and we were disagreeing  
19 as to whether the filing of an amended complaint in the MDL  
20 action would be an administrative matter or a substantive  
21 matter.

22 But the point that I was trying to connect between  
23 these things is that -- is that the filing of an amended  
24 complaint by Mr. Flaxer or a recitation to file a  
25 consolidated complaint to try to get all those theories

1 together is really trying to address Your Honor's tentative  
2 ruling about wanting to know what are the bankruptcy-related  
3 issues, what is -- what is it that they think that they can  
4 go forward on that -- that would not otherwise be foreclosed  
5 by the sale order?

6 All of those things are touching the same thing,  
7 and my suggestion in light of your -- the tentatives and in  
8 thinking about it and the reviewing the letters is that the  
9 issue of whether they should file a complaint in the MDL  
10 action or not should be -- should in effect be deferred  
11 until the next status conference, and that one of the things  
12 that we should be doing between this status conference and  
13 the next status conference is to try to decide what we had  
14 called in our agenda letter the bankruptcy-related issues  
15 that are not the threshold issues, to try to define what it  
16 is that we ultimately are going ask Your Honor to set forth,  
17 because that's the exercise that's imbedded in doing either  
18 the amended complaint to the adversary proceeding or the  
19 amended complaint to try to coalesce all of these  
20 complaints. Those are the issues that someone will have to  
21 decide are bankruptcy-related issues or survive and should  
22 go forward without, and that's the exercise that I think  
23 should be done, and I don't think we should reach a firm  
24 decision as to whether they should be doing anything more  
25 than -- on the MDL proceeding to go forward on May 29th, do

1 the things like selection of lead counsel, the things that  
2 we can agree are purely administrative, and we should defer  
3 consideration of the amended complaint issue until the next  
4 status conference.

5 THE COURT: But matters of the character that the  
6 MDL could appropriately determine in your view could include  
7 whether the pretrial proceedings take place in say  
8 California on the one hand or New York on the other?

9 MR. STEINBERG: For the MDL I think the MDL should  
10 be able to select which forum is going to go forward on  
11 generally the MDL action to the extent that the MDL action  
12 will ever go forward.

13 THE COURT: Okay. Continue, please.

14 MR. STEINBERG: The -- Your Honor, with regard to  
15 the -- your tentative ruling on the stipulated record and  
16 that we don't do admissions, that is essentially what we  
17 have been trying to urge on the plaintiffs.

18 One of the issues was that we had discussions  
19 separately with one group versus another group and they had  
20 differing views on certain issues. And even with the group  
21 that had a larger issue what we were getting to some extent  
22 was the lowest common denominator. When you have 15 people  
23 having suggestions sometimes you get 15 suggestions because  
24 no one really wants to whittle it down and they leave it up  
25 to us to do it.

1           We urge to do a stipulated record under the theory  
2       that it's too early to do admissions, it is a -- really just  
3       a cost shifting issue as Your Honor had identified, and it  
4       leads to a dialogue. If they -- if they propose that they  
5       want us to agree to something instead of me answering as I  
6       would answer an admission I'd be sitting there saying I  
7       can't do that but I can do something different and then we  
8       would have an iterative dialogue to be able to try to  
9       present what the issues are and then I wouldn't have to try  
10      to do the reflexive issue, which is that if you want  
11      admissions then maybe I have admissions that I want to ask  
12      of you. Did you know of the bankruptcy proceeding? Did you  
13      know of a problem with your car? Those things and try to  
14      identify those issues, which may be relevant to certain of  
15      the issues whether it's -- that they may tangentially relate  
16      to the fraud on the Court issue, which may be off the table  
17      now, but -- so I said stay with the stipulation and if we  
18      can't agree to it we'll have a status conference in June and  
19      we'll tell the judge this is as far as we could get and we  
20      couldn't get all the way there, and if we couldn't agree on  
21      everything then you could propose what kind of limited  
22      discovery you think you need to conclude those facts that  
23      are necessary to determine the purely legal issue. We'll be  
24      able to evaluate it. And then if we can't agree with that  
25      we'd be before Your Honor on something specific and

1 concrete.

2 And the problem that we were having between now  
3 and May 2nd is that there was a lot of general propositions  
4 that were asserted and many times the devil is in the  
5 detail, and you need to know when someone says it's purely  
6 administrative it's not substantive you really need to know  
7 what they are talking about. When people say we can agree  
8 to some facts and it's not going to be big, it's going to be  
9 narrowly tailored you need to know what someone means when  
10 they say narrowly tailored, because when actually try to pin  
11 it down it becomes a lot more difficult.

12 So what we were proposing -- and I think there was  
13 a lot of receptivity on it from the other side -- was a walk  
14 and then run, which is give us a chance to try to do an  
15 exchange and we'll see how good we are, and give us a chance  
16 if we can't fill in all the gaps to how to complete the  
17 discovery and we'll see how good we are, and if we can't do  
18 it then I know that you're going to bridge the gap for us  
19 and then we'll both live with whatever Your Honor rules.  
20 And we're only looking to defer that consideration where we  
21 otherwise couldn't agree for like a six or seven-week  
22 period.

23 And the reason why we think that time period going  
24 a little longer versus shorter is better -- and I think Your  
25 Honor eluded to that as one of your tentative rulings that

1 sometimes things take a little longer and these serious  
2 issues -- is that until we know how they've organized -- and  
3 it's really their job to organize, but it's our burden to  
4 make sure that we're dealing with 2 groups of people,  
5 4 groups of people, or 20 groups of people, because it  
6 becomes harder to figure out briefing schedules, potential  
7 discovery, stipulation of facts if we don't know who the  
8 people are that we're dealing with you may need to have a  
9 little more time until they get better organized to be able  
10 to do that. That's why we actually suggest in our agenda  
11 letter is just tell us if you formed a group. That has the  
12 salutary effect of at least we know who we're dealing with  
13 and Your Honor will know whether they actually formed the  
14 group, and those who decide they want to be outliers well  
15 then they will have to stand up and tell Your Honor why they  
16 need to be an outlier and the liaison groups couldn't  
17 properly be formed.

18 But that's all we were trying to say on that  
19 issue, which is give them an opportunity to get themselves  
20 organized and let us know how successful you were, and where  
21 you were not fully successful just let us know because we --  
22 we on our side of the table procedurally have to deal if  
23 they're not fully organized and then ultimately Your Honor  
24 will have that same issue about how things are being  
25 presented to Your Honor.

1           With regard to -- so that's why we thought we  
2           needed a little more time. And by the way, the dates that  
3           we selected in our letter were given to us by one of the  
4           plaintiff groups, and the other plaintiff group actually  
5           said, while they shortened our dates, they also said in  
6           their letter that they're flexible about the dates. So I  
7           don't think ultimately at the end of the day we're going to  
8           disagree about dates, about when we're going to be here.

9           I think the general proposition is that between  
10          now and some time in mid to late June when we'll have  
11          another status conference we're going to try to accomplish a  
12          stipulated record for briefing the threshold issues and to  
13          see whether there's any discovery that is it warranted or  
14          not with regard to that stipulated record.

15          And I would suggest also, and this is off my  
16          agenda letter, but picking off on the tentative ruling,  
17          trying to identify during that period of time the other  
18          issues which are not threshold issues, the other bankruptcy-  
19          related issues that we'd ask Your Honor to consider, and  
20          we'd be doing all of that presentation at the next status  
21          conference. And at that next status conference, to the  
22          extent that the defendants are not fully organized, that we  
23          would try to -- and it wouldn't be me, but it would be Your  
24          Honor and the plaintiffs -- try to figure out how they can,  
25          you know, get to the end to themselves more fully organized.



1           The tentative that you had about the GUC Trust,  
2     late-filed claims, excusable neglect, we actually think that  
3     this is an issue that should be dealt with. It is not our  
4     issue, but to the extent that they've raised or some of them  
5     have raised a procedural due process issue relating to the  
6     bar order, which was after the sale order had taken place  
7     and they're saying that they don't have a remedy -- an  
8     effective remedy against Old GM, well there is a GUC Trust,  
9     there are a number of -- there's a number of values still  
10    left in the GUC Trust. Whether they actually are a  
11    creditor, where they actually have excusable neglect I'm not  
12    trying to prejudge it, but we were urging that they  
13    shouldn't just assume that there was nothing there when  
14    there is potentially something there and they should be able  
15    to and should be almost in fact required to at least explore  
16    that as an alternative to try to get a recovery, if they're  
17    entitled to a recovery. I wasn't trying to say that they  
18    were or not.

19           As far as the suggestion of mediation, it is  
20    always hard to say that you're against mediation. The only  
21    thing that I would say, Your Honor, is that New GM has hired  
22    Ken Feinberg, who is a very well known person who tries to  
23    figure out how to deal with circumstances and to how to  
24    adjust situations on a non-legal base, but to try to  
25    negotiate a resolution.

1           Mr. Feinberg is working on the matter but he  
2           hasn't -- while studying what to do he hasn't taken it to  
3           the next step. And my own feeling about mediation is that  
4           we would like to see whether Mr. Feinberg -- what  
5           Mr. Feinberg will do and not do and let's see where the  
6           legal issues lie, but understand that the overall sentiment  
7           that Your Honor expressed, which is that at the end of the  
8           day if there's going to be a negotiated resolution you  
9           better do it -- you're better off doing and being able to  
10          pay the people who claim to have suffered injury, better off  
11          paying them than to end up building up a big load star and  
12          paying other people.

13          Your Honor had asked what the -- to confirm what  
14          these lawsuits were about. Your Honor was absolutely  
15          correct that under the MSPA, the asset purchase agreement  
16          upon which New GM took assets, that New GM assumed the  
17          liability for the glove box warranty, the lemon law  
18          liability, and for accidents, incidents that led to the loss  
19          of life, personal injury, or property damage for anything  
20          that took place after the sale. So if there was an Old GM  
21          vehicle that was -- got into an accident after the sale and  
22          that led to an injury issue that was something that New GM  
23          assumed the responsibility for.

24          These lawsuits are not those cases, and we didn't  
25          move by the way just so it's clear -- we did not move to

1       enforce Your Honor's injunction for the presale accidents,  
2       which were actually retained liabilities under the MSPA. We  
3       purposely carved out the accident victims whether it's  
4       presale retained liability or post-sale assumed liability,  
5       because we wanted to focus in as to what these lawsuits were  
6       about. These lawsuits are about a claimed economic loss,  
7       the value of a car which is six, seven, eight, nine, ten  
8       years old for the loss in value because of the announcement  
9       that there was going to be an ignition switch recall and  
10      that that car had lost its value until the time that it is  
11      being repaired through the recall or not. I'm not sure if I  
12      can figure that out.

13               THE COURT: Pause please. Maybe this question is  
14      better directed at your opponents. But is this before or  
15      after the cars were fixed?

16               MR. STEINBERG: This --

17               THE COURT: I mean the loss in value, because I  
18      would assume that if a car hasn't been fixed it would lose  
19      value, but I'm not sure what the view of --

20               MR. STEINBERG: This has --

21               THE COURT: -- parties would be after it's been  
22      fixed.

23               MR. STEINBERG: This I don't think has anything to  
24      do with the cars being fixed or not, because by virtue of  
25      the recall New GM is committed to fixing the cars, replacing

1 the ignition switches, and to doing it tentatively now they  
2 think they'd be able to complete it by the end of October of  
3 this year. So everybody is going to have their car fixed  
4 and so the ignition switch is going to be fixed. This is a  
5 perceived loss in value of a car that has some history on it  
6 for the -- because of the announced recall for whatever that  
7 loss of value is.

8 So frankly in one of the individual cases that was  
9 brought in Texas where we were involved in a litigation as  
10 to whether all of the cars with the ignition switch issued  
11 should be parked. The actual lawsuit was about a 2006  
12 Cobalt -- Chevy Cobalt which had 165,000 miles on it, and  
13 the issue was the deterioration in value of that car by  
14 virtue of the announcement of the ignition switch recall.  
15 That was what that lawsuit was about.

16 The injunctive relief was whether all cars should  
17 be parked because of a perceived defect between now and  
18 until it was repaired.

19 But that was the nature of that lawsuit, and I  
20 know that if I'm not properly characterizing how the  
21 economic losses are I'm sure that the people who'll follow  
22 me at this rostrum will be able to -- be able to do that,  
23 but that's my understanding of it.

24 These are people who have not had any accident,  
25 any property damage, or personal injury, this is for the --

1 and they are going to get compensated for -- they are going  
2 to get their -- the repair of the ignition switch by virtue  
3 of the recall, and I think that to the extent that they had  
4 to do it themselves before the recall has a provision about  
5 whether they get compensated for that as well, but this is  
6 for the perceived deterioration in the value of their car by  
7 virtue of this announcement.

8 Now just to make it clear too because it deals  
9 with the issue, Your Honor, as to what's, you know, the New  
10 GM conduct versus the Old GM conduct. I think Your Honor  
11 had talked about that. All of the -- all of the cars with  
12 an ignition switch issue, all of them were Old GM vehicles.  
13 By the time of the sale the ignition switch had been  
14 corrected in the cars. The recall --

15 THE COURT: By that you mean new cars then being  
16 constructed?

17 MR. STEINBERG: Right.

18 THE COURT: Okay.

19 MR. STEINBERG: The issue why the recall involves  
20 some post-sale cars is a nuance difference.

21 What happened was someone with a new car, which  
22 had a good ignition switch, would go in to have their car  
23 repaired and there was a possibility that the person who  
24 repaired that car, which may have been a GM dealer or may  
25 have been someone totally different, they may have actually

1 put in an old ignition switch part. They may have taken a  
2 good part out and put a bad part in. And since New GM  
3 didn't know whether -- whether that -- which cars that  
4 occurred to it announced the recall for some post-sale cars.  
5 But the cars that would ever be impacted by this is a very,  
6 very small element, but New GM is repairing all of those  
7 ignition switches.

8 So the issue in our view is that we believe that  
9 everything they're talking about relates to Old GM conduct,  
10 Old GM manufactured cars, and that -- and that what they're  
11 trying to build on is the fact that under the sale order and  
12 the MSPA New GM accepted as a covenant, not an assumed  
13 liability, but a covenant, to comply with -- with the  
14 federal laws relating to recall, and they're saying that  
15 that somehow creates claims because New GM didn't recall  
16 these vehicles fast enough and that they should have done it  
17 faster. And we believe that all of that relates to -- all  
18 of those claims whether they could ever assert that as a  
19 private right of action, which we don't think is correct, we  
20 think all of that is an Old GM retained liability issue.

21 Now, I don't expect them to agree with my  
22 recitation of that, but that is the nuance, right, that is  
23 the issue as to why it's not a clear demarcation.

24 What is clear is that if New GM manufactured and  
25 sold the vehicle and anything happen to do that vehicle that

1 is not a retained liability, that is a --

2 THE COURT: An ordinary liability.

3 MR. STEINBERG: -- that is an ordinary New GM  
4 liability. And if there was an accident that has taken  
5 place based on an Old GM vehicle, that is not before Your  
6 Honor, that is not part of the list of ignition switch  
7 actions that we brought before Your Honor, that's going to  
8 go forward in New GM, understands that New GM is defending  
9 that. It's not also part of the MDL. So that is -- that is  
10 why I think --

11 THE COURT: Pause please, Mr. Steinberg, I'm  
12 trying to keep up with you.

13 What was the very last thing you said, the nuance  
14 you were making on what would still be going forward?

15 MR. STEINBERG: What is going forward is if  
16 there's an accident relating to an Old GM car and if there's  
17 an accident relating to a New GM manufactured car.

18 THE COURT: Any kind of accident.

19 MR. STEINBERG: Any kind of accidents are going  
20 forward.

21 With regard to just the glove box warranty and the  
22 lemon law, just so Your Honor understands the nuance that we  
23 put in our papers, is that lemon law is defined in the MSPA,  
24 it's defined as that you need to have brought it more than  
25 one time to have a repair and it wasn't done. And our

1 argument is that while we did assume lemon laws none of  
2 these ignition switch actions that have been pled to date  
3 talk about having brought it once to have it repaired and it  
4 wasn't repaired and the second time it wasn't repaired to  
5 qualify within the definition of what a lemon law means for  
6 purposes of our assumption.

7 So I think it's correct that we did agree to  
8 assume lemon laws, but -- a lemon law type claim, but none  
9 of what is being asserted here fits within that paradigm.

10 If I'm wrong and there's a particular nuance out  
11 of all the lawsuits that have been brought that was one of  
12 the elements that we had asked for in our motion to enforce  
13 which is in effect to show cause, tell us why you think  
14 you're not otherwise bound, that you fit within the lemon  
15 law that we assume because of your particular fact  
16 circumstance and then we would evaluate it. Because I can  
17 make the general statement, but there may be a specific  
18 exception that I haven't accounted for, but the general  
19 statement is as far as I'm aware, based on the general  
20 pleadings that have been done, is that no one asked to have  
21 this being repaired a second time. And as far as the glove  
22 box warranty we're -- for all of these vehicles we're -- or  
23 almost all these vehicles we're outside of the glove box  
24 warranty, it's expired by this point in time.

25 So I think, Your Honor, with regard to the issue



1       that you had raised about the threshold issues we actually  
2       had thought that the issues that had been raised in the  
3       adversary proceeding under Rule 60 were all threshold  
4       issues. We understand the differences, and if it turns out  
5       we can streamline discovery significantly by taking out  
6       fraud on the Court that may be a better way to go, and we do  
7       agree also that the discrimination issue that was raised by  
8       Mr. Weisfelner in his papers is a pure legal issue. I  
9       frankly think Your Honor has decided the legal issue before,  
10      but it's a pure legal issue and we think it should be taken  
11      off the table. And frankly there's a practical reason why  
12      it should be taken off the table and we eluded to it in our  
13      papers.

14               One of the things that Mr. Feinberg has been hired  
15      to do is to evaluate whether there's something that should  
16      be done to these prepetition accident victims, people who  
17      have actually had an accident to which are a retained  
18      liability should New GM --

19               THE COURT: That would mean people who were  
20      injured in prepetition accidents who were only getting 30  
21      cents on the dollar who had filed claims --

22               MR. STEINBERG: That's correct.

23               THE COURT: -- or who had blown the bar date but  
24      were actually hurt?

25               MR. STEINBERG: Right. That's why Mr. -- that was

1 one of the primary reasons why Mr. Feinberg has been hired,  
2 to see whether there's something that should be done as a  
3 general basis.

4 If someone is going to say that if we did someone  
5 on a voluntary basis for those victims, those people who  
6 actually suffered an injury from an accident that we're  
7 somehow picking up liabilities for a bunch of people who are  
8 worried about the deterioration and the value of their car  
9 then I think we need to know that, and so therefore we want  
10 to put this as an earlier issue and not a later issue. And  
11 if they want to abandon it because they don't think it's a  
12 proper issue to raise then that's okay too. We're not  
13 trying to litigate something that they're prepared to  
14 abandon, but it has been raised.

15 If you actually read the pleading filed by -- on  
16 this issue it makes it seem like it's a very important issue  
17 and we're prepared to meet it head on and to -- and I don't  
18 think it requires any discovery at all.

19 If you just bear with me just one second, Your  
20 Honor, just to go through the rest of my notes.

21 I think that Your Honor when we -- when I came  
22 into court and I think Your Honor summarized it correctly we  
23 had actually agreed in many concepts with the people that we  
24 had spoken with, and so there was a general understanding  
25 that they would stand down on litigation and that those who

1        didn't -- who weren't prepared to stand down would have to  
2        show cause as to why they think they shouldn't stand down.

3                And there was a recognition on our part that to  
4        the extent that we got bogged down for some reason that we  
5        couldn't envision on the threshold issues and the other  
6        bankruptcy-related issues needed to be brought to attention  
7        or that they thought that there were issues that were not  
8        bankruptcy-related issues but they had decided to in effect  
9        wait on and that they would otherwise be a part of the MDL  
10       we had agreed, and I think the date differences were end of  
11       July versus beginning of September, we would have an  
12       effective grace period but then we thought they had to come  
13       to Your Honor. If they wanted to relax the stay because  
14       they thought they were otherwise being aggrieved because  
15       this process wasn't playing out the way that they had  
16       envisioned or that they thought they --

17               THE COURT: You mean the process before me in  
18       terms of --

19               MR. STEINBERG: That's correct.

20               THE COURT: -- getting these issues --

21               MR. STEINBERG: That's right.

22               THE COURT: -- judicially decided?

23               MR. STEINBERG: They then could try to make their  
24       case before Your Honor, and we thought that that was okay.  
25       I mean no one -- no one could quite envision exactly how

1       this is going to go, we wanted to have a breathing spell to  
2       make sure that this is going along in the direction that  
3       everybody thinks it's going along, but we were not looking  
4       to permanently foreclose anybody's rights if they thought an  
5       adjustment had to be made. And so if they needed to have  
6       that explicit as part of their agreement up front to stay  
7       their litigation then we were prepared to do it, and I think  
8       there was just a difference in a month, and I think our date  
9       was -- probably made more sense because of the inherent  
10      delays that we'd have in the system.

11               I think, Your Honor, we had agreed on most of the  
12      threshold issues and Your Honor's tentatives had addressed  
13      the rest. We had actually agreed to in effect do this in  
14      two steps, and Your Honor has properly identified that while  
15      doing it in the two steps we should make progress and try to  
16      identify what will be litigated in the second step. And I  
17      think Your Honor's tentative addressed the differences we  
18      had on stipulations of facts versus admissions and the  
19      timing of submissions.

20               So I think Your Honor's tentatives have bridged  
21      the gap where we differed and we were fairly close coming  
22      into the courtroom, and I think you for that and I'll turn  
23      over the rostrum to other people.

24               THE COURT: Before you do, please, Mr. Steinberg.

25               The day after you wrote your letter, I think yours

1 was on April 30th, I got both a letter and a black line from  
2 Mr. Weisfelner where he'd massaged what had been one of your  
3 paragraphs and he gave me a black line articulating issues  
4 that would be decided as threshold issues. Is there any  
5 difference between you and Mr. Weisfelner, that is between  
6 your thinking and his black line mark up?

7 MR. STEINBERG: Yes. The --

8 THE COURT: On that point, how so? I didn't  
9 follow that.

10 MR. STEINBERG: Well our original proposal  
11 included fraud on the Court being a threshold issue and they  
12 had crossed that out, so that is one difference.

13 The second difference was that we thought the  
14 discrimination argument was a threshold issue and they had  
15 said they didn't think it should be a threshold issue.

16 THE COURT: So he wanted to drop fraud on the  
17 Court from the first phase and you leaned in favor, although  
18 I thought you -- the way I heard you you didn't think of it  
19 as something you felt strongly about, you thought that with  
20 limited discovery it could be considered as a Phase I issue  
21 and you favored inclusion of the discrimination argument and  
22 you understood him to prefer not to deal with that now.

23 MR. STEINBERG: I think he crossed that out and  
24 asked to not deal with that, yes.

25 THE COURT: Okay.

1 MR. STEINBERG: So --

2 THE COURT: Thank you.

3 MR. STEINBERG: -- and so just to be clear, while  
4 I thought fraud on the Court should be a threshold issue  
5 because it's a Rule 60 issue, to the extent that we can  
6 accomplish something significant on the discovery front in  
7 curtailing it then I understand clearly the logic of making  
8 that a secondary issue.

9 THE COURT: Okay. Thank you.

10 Mr. Weisfelner.

11 MR. WEISFELNER: Judge, thank you, I don't know  
12 what Your Honor's preference is.

13 Not only have some of our thoughts matured and  
14 changed over time but based on Your Honor's tentatives and  
15 the questions you asked they may change even further.

16 I don't know that we can accomplish a lot in a  
17 ten-minute recess, but one of my colleagues passed me the  
18 note to ask if you thought it would be appropriate. If not  
19 I can start and go forward and take a break whenever Your  
20 Honor thinks is good.

21 THE COURT: Well if you think it would be  
22 productive I'm not going to stand in the way of that,  
23 Mr. Weisfelner. I don't want to use up what is relatively  
24 limited time that we have if it drifts, and there are a lot  
25 of people both on the phone in this courtroom and presumably

1 in overflow courtrooms, but if you think you can usefully  
2 use ten minutes I think that's a good investment.

3 MR. WEISFELNER: And, Your Honor, I think ten  
4 minutes is the right -- we're either going to make progress  
5 in ten minutes or we're not.

6 THE COURT: Okay.

7 MR. WEISFELNER: So I wouldn't want anymore than a  
8 ten-minute adjournment.

9 THE COURT: Then let's recess until five to 11:00  
10 on the clock up there.

11 MR. WEISFELNER: Thank you, Judge.

12 THE COURT: Thank you.

13 (Recess at 10:44 a.m.)

14 THE COURT: Have seats everybody.

15 MR. WEISFELNER: Your Honor, thank you for the  
16 time, I think it was well spent.

17 Judge, for the record, Edward Weisfelner, Brown  
18 Rudnick LLP appearing on behalf of the Robinson Calcagnie  
19 firm, and I have Mark Robinson of the firm with us in court  
20 today as well as Haigins Berman (ph), and as Your Honor has  
21 indicated while they reserve the right obviously to correct  
22 me where I go wrong we are working closely together with  
23 Sander Esserman of Stutzman, Bromberg, Esserman & Plifka, as  
24 well as Elihu Inselbuch of Caplin & Drysdale, and as I think  
25 Your Honor knows the collective plaintiff group has also

1 asked the three of us to coordinate our activities as we  
2 deem necessary with Ms. Siganowski (ph) of the Otterbourg  
3 firm, and we will utilize her services as appropriate and  
4 necessary.

5 Judge, I want to as Mr. Steinberg did address your  
6 tentatives, move on to your questions and avoid merits, name  
7 calling, and the other no-noes that Your Honor laid out, but  
8 I would like to note a couple of factors that I think are  
9 relevant and bleed directly interest your tentative ands  
10 your questions.

11 What one may characterize as part of the good news  
12 there's lots of information in the public domain regarding  
13 the defect that's the subject of the recall. Lots in the  
14 public domain about who knew what when.

15 I characterize that as good news to the extent  
16 that, and as Mr. Robinson has indicated to me, in his many,  
17 many years of litigating in the auto products field both in  
18 terms of Toyota, the Ford Pinto, claims against GM, it's  
19 rare that you see this level of information already in the  
20 public domain before discovery or formal discovery between  
21 the parties necessarily starts. That's part of the good  
22 news.

23 Part of the bad news is, depending on your  
24 perspective, but I think it's a relevant factor in  
25 understanding how the parties can or can't get together in



1 terms of the timing of the resolution of the issues, the  
2 fact of the matter is that New GM, as we understand it, is  
3 the subject of a -- it's a term of art -- boatload of  
4 regulatory investigations. We are aware of congressional  
5 investigations, and maybe there's more than one, at least  
6 one attorney general investigation, an SEC investigation.  
7 We understand that New GM has commenced its own internal  
8 investigation, and I may have run out of fingers to count  
9 just how many investigations they're currently the subject  
10 of.

11 I mention those because one could imagine a  
12 sensitivity on the part of a corporate entity to necessarily  
13 engage in discovery during the pendency and/or before  
14 investigations of both civil and potential criminal  
15 consequences are concluded. And I can only advise Your  
16 Honor that I think it behooves both sides to take the  
17 reality of what's going on in the marketplace into  
18 consideration with regard to the timing of discovery or the  
19 narrowing of issues between the parties. There are other  
20 factors that might influence either side of the tables'  
21 speed with regard to those issues.

22 Your Honor, to address the tentatives.

23 First of all I think from a starting perspective,  
24 and I was unavailable for another meeting among plaintiffs  
25 that took place yesterday in New York, but I've gotten a

1 download, and I'm not blaming Mr. Steinberg, Your Honor  
2 ought to know that with one outlier, and only one outlier  
3 that I'm aware of, the plaintiffs as a group are on the same  
4 page and intend, unless I or Elihu or Sander slip up, to  
5 allow one or the other of us to speak for the group, and I  
6 presume that outlier will speak for him or herself at an  
7 appropriate time.

8 And I also understand that the difference of  
9 opinion between all of the plaintiffs and this one single  
10 plaintiff really comes down to what ought the threshold  
11 issues be that the parties work towards preparing and  
12 presenting to Your Honor for as efficient resolution as is  
13 possible. And it boils down to a distinction between  
14 whether or not we focus our collective attention on the what  
15 we think is the right threshold issue, whether or not  
16 parties impacted by this ignition switch problem were denied  
17 due process, and if so what's the appropriate remedy?

18 They would, the outliers would like to put on the  
19 table as part of the threshold issue a determination of  
20 whether or not there was fraud on the Court. And, Your  
21 Honor, again, for reasons that we can delve into I don't  
22 think they're necessarily appropriate for today because  
23 there'll be another status conference where I think whatever  
24 remaining differences there are between the plaintiffs taken  
25 as a group and New GM can and will be resolved down to the

1 details of timing for discovery, briefing, and subsequent  
2 hearings.

3 Your Honor, the next tentative you talked about  
4 was the MDL proceedings and I'd like to unpack that just as  
5 a matter of fact into two parts, because I think as to part  
6 number one there is unanimity in the entirety of the  
7 courtroom. All plaintiffs and New GM as to what happens in  
8 step one, and as I understand it only a very narrow  
9 disagreement on what I'll call step number two.

10 And, Your Honor, please forgive me because the one  
11 thing I'm not is a class action or tort lawyer, I'm just a  
12 measly bankruptcy lawyer, but this is what I understand the  
13 two parts to be.

14 Part number one, on May 29th in Chicago before a  
15 joint panel on multidistrict litigation, which I understand  
16 consists of some seven Article III judges, that panel will  
17 determine the venue for any further multidistrict litigation  
18 consideration, and I've been told that the panel has under  
19 consideration --

20 THE COURT: Pause. When you put it that way I  
21 wasn't clear on whether you were talking about it consistent  
22 with my understanding of what would be done by the judicial  
23 panel and multidistrict litigation. Is this 28 U.S.C. 1407?

24 MR. WEISFELNER: Yes, it is, Your Honor.

25 THE COURT: Which as I understood it addresses the

1 locale for pretrial proceedings in multiple litigation after  
2 which when the pretrial proceedings end they're farmed back  
3 to whatever districts, venue would otherwise be appropriate?

4 MR. WEISFELNER: Correct. So --

5 THE COURT: Now were you meaning -- forgive me.  
6 Were you meaning to say something different than my -- what  
7 I just said?

8 MR. WEISFELNER: No, other than where I think we  
9 all agree is that nothing is going to interfere with, and  
10 none of the parties or the Court, nor will the Court be  
11 asked to interfere with the activities of the joint panel on  
12 the 29th, which we all understand to mean that they'll pick  
13 an ultimate venue for MDL proceedings as between Michigan,  
14 California, New York, or some other jurisdiction.

15 Where we appear to have a difference of view, as I  
16 heard Mr. Steinberg discuss the issues before Your Honor,  
17 was how far should the MDL go once it receives the case some  
18 time after May 29th?

19 THE COURT: By that you mean the temporary  
20 transferee court after it's been transferred by the panel?

21 MR. WEISFELNER: Correct.

22 THE COURT: Okay.

23 MR. WEISFELNER: And as I understand it what that  
24 court will do is procedural, it will among other things  
25 select lead and/or liaison counsel not for bankruptcy

1 purposes but for purposes of actually trying the case, and  
2 as typically happens would require that the many complaints  
3 filed against New GM -- and as I understand it they're up to  
4 some 60 plus different class action complaints -- be  
5 procedurally consolidated into a single complaint, a process  
6 that my guess will take a period of time, and certainly a  
7 period of time beyond what we anticipate to be the next  
8 status conference before Your Honor.

9 But we wouldn't want the record of this or any  
10 other proceeding before Your Honor to be used or cited for  
11 the proposition that from Your Honor's perspective getting  
12 the complaints narrowed down to a single complaint, doing  
13 whatever else it is that the MDL judge typically does, which  
14 is figure out which counsel they're going to for lack of a  
15 better word lead the fray, there should be nothing that  
16 impacts that procedural mechanism from moving forward. It's  
17 going to in our view at least get the parties or -- and the  
18 issues that may ultimately be tried narrowed and get the  
19 disbursed plaintiffs' groups better organized on the merits  
20 should they ever get to the merits.

21 THE COURT: Pause, please, Mr. Weisfelner.

22 MR. WEISFELNER: Certainly.

23 THE COURT: Can you envision a scenario under  
24 which rulings by me might affect the extent to which claims  
25 remain which would then be the subject of gathering up and

1 bundling in that amended complaint?

2 MR. WEISFELNER: Certainly, and again, this is  
3 just my opinion, but when viewed from the perspective of  
4 judicial economy if there is a single complaint and Your  
5 Honor were then to determine what's kosha (ph) and what's  
6 unkosha (ph) about that amended complaint one has an easier  
7 vehicle to start making chops to.

8 As opposed to, and it sort of bleeds into some of  
9 your other tentatives and some of your other questions, have  
10 a multiplicity of lawsuits and then having to parse each and  
11 every one of them to determine what portion of the  
12 allegations, the complaints, the prayers for relief does or  
13 doesn't violate or do violence to Your Honor's directive as  
14 it currently stands or as it may ultimately morph after this  
15 procedure currently before you develops.

16 THE COURT: You said what I had anticipated that  
17 you would say. The corollary of that would at least  
18 seemingly be that after the panel sends it wherever it's  
19 supposed to go, and I'll call it the transferee judge, even  
20 though it may eventually go back somewhere or to different  
21 places, that there simply be a stop, look, and listen, vis-  
22 à-vis, interfering or not interfering with the acts of the  
23 transferee judge after determinations have been made in this  
24 court and everybody in this room has had his chance to speak  
25 his peace.

1 MR. WEISFELNER: And, Your Honor, I think like  
2 many things in life it's all a matter of timing. Because I  
3 anticipate the transferee court is never going to get around  
4 to the job of figuring out what's the next procedural steps  
5 to narrow the issues that may be before him or her. I think  
6 we'll be further advanced on the issues that need to be  
7 resolved by Your Honor, and the coordination between Your  
8 Honor's decision making process and what does or doesn't  
9 happen in the MDL will be much further advanced.

10 So while I'm not sure that it benefits anyone to  
11 pursue this in any greater detail, my only point with regard  
12 to this is I detected a difference between where we come  
13 out, where I thought New GM was coming out on this, and what  
14 I heard Mr. Steinberg say earlier this morning, which is we  
15 have to leave open the possibility that the MDL proceedings  
16 may be put on ice simply because this process is still  
17 ongoing without a resolution.

18 THE COURT: Well stand by. Mr. Steinberg, come on  
19 up and take Mr. Weisfelner's place for a second.

20 Is there a substantive disagreement here? Because  
21 I thought I was hearing consensus that we'd let the MDL  
22 panel decide who the transferee district should be and then  
23 we're going to have stuff that goes on here.

24 Would you have a substantive or procedural problem  
25 with doing a stop, look, and listen in this court to then

1 decide whether I should enjoin the transferee judge from  
2 doing anything more, or should not do so?

3 MR. STEINBERG: Your Honor, I would agree with  
4 everything that you say except that I would assume that you  
5 would be enjoining the parties not the court from moving  
6 forward.

7 THE COURT: Correct. And I don't think in 13 and  
8 a half years I've ever enjoined a court, but I enjoin  
9 parties all the time.

10 MR. STEINBERG: Then other than that, Your Honor,  
11 I agree with exactly what you said.

12 THE COURT: Okay.

13 All right, Mr. Weisfelner, I think that issue just  
14 went away so come on up and let's proceed.

15 MR. WEISFELNER: Great.

16 Your Honor, we take your points to heart with  
17 regard to tentatives three and four both with regard to the  
18 propriety of standstill agreements and your admonition that  
19 we don't necessarily -- we shouldn't necessarily be rushing  
20 in favor of getting it right.

21 One area where I think the parties may need some  
22 additional time with each other but maybe we could explore  
23 in a little bit more detail Your Honor's tentative with  
24 regard to new complaints along the lines of what Mr. Flaxer  
25 filed.



1                   And I will tell Your Honor frankly that before  
2                   Mr. Flaxer hit the docket with his complaint I know I and my  
3                   shop and I venture to guess many other shops were working on  
4                   similar complaints.

5                   Viewed from our perspective is the right  
6                   procedural mechanism for bringing the issue before Your  
7                   Honor; however, once we had the advent of New GM's motion  
8                   frankly I'm not sure what the procedural advantage is of  
9                   moving forward with that adversary proceeding complaint much  
10                  less inviting other parties to replicate it or to file  
11                  additional or add-on adversary proceeding complaints. It  
12                  may -- it may involve some interesting work by a bunch of  
13                  bankruptcy and/or class action firms. I think it's just  
14                  going to clog the docket here, and I think procedurally we  
15                  were of the view that rather than lose any of the  
16                  allegations or procedural advantages that are perceived or  
17                  actually exist in the adversary proceeding they all ought to  
18                  be subsumed within the contested matter. Parties ought to  
19                  be afforded an opportunity to file their own objections to  
20                  the motion, join in our objection to the motion, or anything  
21                  in between.

22                  But I'm not sure, nor do my colleagues feel, that  
23                  there's necessarily a substantive or procedural advantage to  
24                  separating the adversary proceeding and giving it a life of  
25                  its own even for the purposes of inviting other people to

1 file new adversary proceedings.

2 THE COURT: I partly lost you with the negative  
3 that was in your last sentence. In other words you're  
4 saying the formalities aren't important, put it in a big  
5 bundle and just decide it all together or am I --

6 MR. WEISFELNER: That's exactly --

7 THE COURT: -- stating it too crudely?

8 MR. WEISFELNER: No, that's -- well, you couldn't  
9 have stated it any cruder than I would have had I thought  
10 about it, but that's exactly our sentiment, you know, let's  
11 have one bundle and not have separate adversary proceedings  
12 and separate contested matters, let along invite people to  
13 file new adversary proceedings that address the same issue.  
14 And I think the parties did intend on conferring with each  
15 other on appropriate procedural mechanisms to allow that  
16 ball of wax to form without violating anybody's procedural  
17 or substantive rights. And I think we can come up with in  
18 very short order, certainly before the next status  
19 conference, the procedural mechanism that we think is  
20 appropriate. But what we would like to avoid is either the  
21 necessity or the thought out there that people better rush  
22 to file, you know, identical or new or expanded adversary  
23 proceedings.

24 THE COURT: Now that's a different point than the  
25 separate -- at least in your mind from the separate point

1       that I thought I was making that if there are any  
2       substantive issues on the table that haven't been  
3       potentially to be put on the table that I want to hear what  
4       those points are.

5               MR. WEISFELNER: And I think that can be readily  
6       accommodated by virtue of setting a date by which parties  
7       will want to respond to the motion that New GM has filed. I  
8       mean we obviously filed within, and I think before the  
9       expiration of 24 hours. Obviously there may be people out  
10      there with further reflection that come up with better,  
11      different, more expansive responses and we don't want to  
12      preclude that. We just don't want to get into a  
13      (indiscernible - 01:19:05) of a separate docket for an  
14      adversary proceeding, a separate docket for contested motion  
15      practice, and any possibility that, you know, the resolution  
16      of those issues shouldn't be at some point joined. And  
17      again, I think the parties can work out a proposal for Your  
18      Honor's consideration that deals with melding together the  
19      adversary proceeding and the contested matter.

20             Number five, Your Honor, which I guess was the  
21      issue between stipulations and admissions. And, Your Honor,  
22      I think the answer is we get it and the parties will work as  
23      best they can on stipulations and will only elevate the heat  
24      intention as we have to both in terms of narrowing discovery  
25      and avoiding unnecessary contests that have to be determined

1 by this Court. And again, you know, I'm focusing on all of  
2 this from the perspective of the what we've referred to as  
3 the gaiting issue.

4 And this -- and I want to sort of then flip to the  
5 questions that Your Honor asked, and either attempt to  
6 respond to them or tell you why I'd like to evade them as  
7 best I can.

8  
9 And again, you know, I'm focusing on all of this from  
10 the perspective of the what we've referred to as the gaiting  
11 issue. And this -- and I want to sort of then flip to the  
12 questions that Your Honor asked, and either attempt to  
13 respond to them or tell you why I'd like to abade them as  
14 best I can.

15 THE COURT: Before you move on to those, please,  
16 Mr. Weisfelner, the one issue that I still see as open  
17 between you and Mr. Steinberg is with respect to two issues  
18 that might or might not be addressed as part of Phase I, the  
19 most classic threshold issues, fraud on the Court and  
20 discrimination amongst different kinds of creditors.

21 My preference would be in terms of meeting my own  
22 responsibilities would be to get issues on the table and  
23 teed up for judicial determination, and to the extent  
24 practical decided sooner rather than later, which would  
25 cause me to come to the view that on fraud on the Court, if

1 we could deal with that without having the associated  
2 discovery bog us all down, it would be handled sooner rather  
3 than later and the same thing with discrimination, which  
4 doesn't seem to involve discovery issues.

5 I sense that you would prefer to defer fraud on  
6 the Court, but would you be of the same mind to defer it if  
7 just the limited discovery of the type that Mr. Steinberg  
8 recommended were undertaken so that issue could be teed up  
9 with the others?

10 MR. WEISFELNER: Your Honor, we would be opposed  
11 to it and let me explain why.

12 First of all we share Your Honor's perspective  
13 that issues that could resolve matters from the perspective  
14 of either side where discovery can be limited ought to be  
15 preferred on issues that potentially don't decide the matter  
16 even if they don't require a lot of discovery.

17 So let me take the easier example first, the  
18 discrimination issue, raised in retrospect unfortunately in  
19 my papers as opposed to anybody else's. And, Your Honor, it  
20 seems to me that we could brief that issue at whatever cost  
21 is required. It doesn't require discovery. Your Honor  
22 could make a ruling.

23 And notwithstanding how you rule I don't think it  
24 gets the plaintiffs any closer to trying claims against New  
25 GM or for that matter New GM any closer to preventing the

1 plaintiffs' claims from moving forward based on their  
2 reliance on the injunction and the sale order. It's an  
3 interesting issue but it's in no event dispositive of either  
4 parties' position on the fundamental issue.

5 For that reason, even though I was the one who  
6 first raised it and frankly raised it before I understood  
7 the entire history behind the metamorphous that the final  
8 sale order took on the carve out for wrongful death, injury,  
9 and property damage, which as I understood it originally  
10 what New GM was purporting to assume was wrongful death,  
11 personal injury, property damage solely with regard to cars  
12 that it sold post-petition or post-sale rather, and it  
13 morphed at the direction in part of various attorneys  
14 generals and consumer advocates.

15 THE COURT: In the middle of the trial.

16 MR. WEISFELNER: Sorry?

17 THE COURT: In the middle of the sale trial.

18 MR. WEISFELNER: Right.

19 THE COURT: Yeah, I remember the history.

20 MR. WEISFELNER: Okay.

21 THE COURT: Oh, by the way I'm going to interrupt  
22 you. I want each side not to tell me today but to think  
23 about the extent to which I'm allowed to use my knowledge of  
24 what happened back then in connection with the findings of  
25 fact.

1 MR. WEISFELNER: Well, Your Honor, I could tell  
2 you now without even consulting with my colleagues, unless  
3 Your Honor were to be willing to undergo a lobotomy I don't  
4 know how anyone could take the position that Your Honor  
5 cannot, should not, or may not take into account your  
6 knowledge and familiarity with what transpired during the  
7 bankruptcy proceeding and in fact during post-reorganization  
8 or post-restructuring matters that were brought to Your  
9 Honor's attention.

10 But I want to sort of get back to --

11 THE COURT: Pause.

12 MR. STEINBERG: I was going to -- without  
13 inferring whether there should be a lobotomy or not -- I was  
14 going to say that we agree with Mr. Weisfelner as well, that  
15 you should be able to take into account your position.

16 THE COURT: Okay. Fair enough.

17 Go on then, please, Mr. Weisfelner.

18 MR. WEISFELNER: Any way, Your Honor, I'm sort of  
19 getting back to what we ought to be collectively spending  
20 time and attention on.

21 From the plaintiffs' perspective we ought to be  
22 spending time and attention, which converts into money and  
23 effort, in dealing with as narrow a set of facts that we  
24 have to deal with to determine whether or not the sale order  
25 applies to our underlying clients.

1           The discrimination argument, Your Honor, may be  
2       left on the table in the unlikely from my perspective and  
3       unfortunate event that we lose the threshold issue. But why  
4       it needs to be determined today, even though it's an issue  
5       of law and not a matter to discovery, it's not dispositive  
6       from either sides' perspective, it doesn't get us closer to  
7       where either one of us wants to get to.

8           And if I could then turn to the fraud on the Court  
9       issue.

10          Your Honor, there are subtleties on top of  
11       subtleties on top of details that suggest to us that you  
12       could not make a determination with regard to fraud on the  
13       Court with anywhere close to the narrow discovery that  
14       Mr. Steinberg suggests. And it's sort of all subsumed I  
15       think or fear in the whole due process argument, and without  
16       in any way trying to argue the merits but just to lay out  
17       what the issues are as objectively as I can without tilting  
18       them in either direction, remembering again that there's a  
19       lot of information in the public record about what GM knew  
20       when they knew it with regard to the ignition switch.

21          I think that New GM would say, well, wait a  
22       second, determining GM's -- Old GM's knowledge and for that  
23       matter New GM's knowledge isn't necessarily determined --  
24       and I use this very bad analogy but I'll give it to you any  
25       way -- by focusing on the guy in the test laboratory who's



1 got grease up to his elbows and is wearing overalls. That  
2 person may have knowledge, but it may not necessarily be  
3 imputed to someone sitting in a conference room who has the  
4 luxury of wearing a suit and tie every day. And I think New  
5 GM may ultimately argue that Joe the mechanic's knowledge  
6 isn't to be imputed into an executive office let along a  
7 board room.

8 Now frankly we're encouraged by the fact that  
9 plenty of people who wore suits and white collars have  
10 already put their position on the record or it's otherwise  
11 discoverable through things that the National Highway Safety  
12 Council has made available or the Congress has made  
13 available or what we can read and report on in the press,  
14 but to suggest that we can or should pursue fraud on the  
15 Court to my mind and gender is a discovery dispute at three  
16 different levels by the way. Old GM, New GM, and based on  
17 not my intuitions, but my discussions, I think we're going  
18 to get into a discussion of what treasury in its role as the  
19 intermediary between Old GM and New GM knew or didn't know.

20 And as much as I like spending time with Matt  
21 Feldman and Jim Milstein (ph) and Harry Wilson, I don't know  
22 that I necessarily want to get involved in discovery of what  
23 any of those people knew or should have known in the context  
24 of proving --

25 THE COURT: You used the word should have known.

1 Since when is should have known an element of a claim of  
2 fraud against the Court?

3 MR. WEISFELNER: Your Honor, I'm not sure that it  
4 is, which is another reason why when I think about this, and  
5 maybe I think about it in an overly simplistic fashion, but  
6 I have the comfort of knowing that my co-counsel thinks  
7 about it the exact same way, in fact all of the plaintiffs  
8 think about it exactly the same way with the exception of  
9 one possibly outlier, and that is if I start with the  
10 proposition, understanding that it's a proposition and not a  
11 proven fact, that the consumers of this product were known  
12 to have had a defective product and that Old GM did nothing  
13 to let those people know that they had a defective product,  
14 didn't give them notice of the bankruptcy, didn't give them  
15 notice of the sale, and didn't give them notice of the  
16 extent to which the sale could affect their rights, if our  
17 contentions are accurate isn't it the case that these  
18 individuals were deprived of due process?

19 In that context should the sale order apply to  
20 them or should some portion of the sale order apply to them?  
21 Not a revocation of the sale order, we're not going cut it  
22 up and carve it out and chop it up as it relates to anybody  
23 else other than people who prove to you that they were  
24 denied due process.

25 Why we need to then get into at this stage the

1 other elements of fraud on the Court, Your Honor, we  
2 respectfully suggest is beyond what we ought to be doing if  
3 we want to do something efficient and effective from the  
4 perspective of these injured parties.

5 THE COURT: Do you think that for the purposes  
6 solely of my case management discretionary calls, as  
7 contrasted to the merits in figuring out how we should tee  
8 these things up, it's appropriate for me to assume that  
9 there might be a difference between defrauding the driving  
10 public on the one hand and defrauding the Court on the  
11 other?

12 MR. WEISFELNER: Yes. And, Your Honor, I'd make  
13 the distinction though, we're not defrauding the driving  
14 public, that's not our contention. Our contention is that  
15 the number of people who bought, leased, or owned these  
16 cars, and to my knowledge, the number is something below 3  
17 million, I could be wrong, so it's not the driving public,  
18 it's these specific people that were sold cars with this  
19 ignition switch problem.

20 And again, this is not the place or time to get  
21 into this, so then I won't, I just want to get back to your  
22 issue. I do think that it's a matter of Your Honor's  
23 discretion in setting our own calendar in terms of dealing  
24 with dispositive issues first.

25 If Your Honor were to decide that these people

1       were denied due process, and therefore, the injunction that  
2       New GM bargained for should not apply to them, case over,  
3       from our perspective.

4               It's only if Your Honor were to decide there was  
5       no denial of due process, that we may want to ask Your Honor  
6       to tee up and consider other issues. Until that time, I  
7       think it's a matter of case management and Your Honor's  
8       discretion, that's the right way to go. And I say that  
9       because we've thought about it, and we think it's the right  
10      way to go, not to be determinative of what Your Honor  
11      decides in terms of exercising your own discretion.

12             But we clearly think it's the easy way to go, and  
13      I'm not sure I understand how expanding either the factual  
14      issue or the legal issue into fraud on the Court serves the  
15      purpose of narrowing the issues and letting the parties and  
16      the Court get to the -- a resolution in the most cost-  
17      effective manner possible.

18             Now, Your Honor, I'm happy to sort of move on to  
19      the questions that Your Honor had.

20             THE COURT: Go ahead. And I'm going to do this in  
21      such a fashion as I possibly can, so as not to insult the  
22      Court. But you asked what's left its engendered so much  
23      heat, and with all -- in other words, what are the damages  
24      that people could possibly be concerned about here, since  
25      wrongful death, personal injury, and property damage are off

1 the table.

2 And Mr. Steinberg in his opening tried to -- or  
3 talked to you about five, six, seven, eight-year old cars  
4 driven a lot of miles that have a broken switch that GM's  
5 prepared to fix, so what are the damages.

6 Oh, and I think he mixed in the fact that we're  
7 talking about a pretty cheap set of vehicles, Chevy Cobalts  
8 and other such cars. And, Your Honor, in the simplest  
9 terms, it's our view that the measure of damages that  
10 plaintiffs could prove were they permitted to pursue claims  
11 against New GM, notwithstanding your injunction, is a matter  
12 for determination by a court of competent jurisdiction who  
13 doesn't have New GM waving the injunction in front of it.

14 Once that injunction is gone, Your Honor's  
15 question is really within the bailiwick of Court's  
16 interpreting state law, federal --

17 THE COURT: Forgive me, with respect to you, Mr.  
18 Weisfelner, that isn't the purpose of my question. The  
19 purpose of my question is to ascertain the extent to which  
20 claims your guys want to bring, is or is not within the  
21 scope of the existing sale order, which is the question  
22 which we start with after which we then determine the extent  
23 to which the provisions of that sale order are in whole or  
24 in part unenforceable against your constituency.

25 MR. WEISFELNER: Ah.

1 THE COURT: So please do not restate or  
2 misunderstand my question.

3 MR. WEISFELNER: Thank you, Your Honor. I did --  
4 I misunderstood it completely.

5 I should call to Your Honor's attention, and I'm  
6 hoping that this is in the process of being fixed, because  
7 I've been told that's in the process of being fixed, but one  
8 would hope that as this process moves forward and the  
9 parties reach consensus on how to form and present the  
10 issues in the most effective way, that we don't have  
11 exacerbation of the problem or the issue.

12 We were told the story about an individual who in  
13 connection with the recall went to his or her dealer to have  
14 this ignition switch fixed, and was presented by the dealer  
15 with a form that she was being told she had to sign before  
16 the work could be done on her car.

17 And the form, while I haven't seen it, I'm told,  
18 either had the individual consenting to arbitration of any  
19 issue that may arise in connection with the work that was  
20 being done and/or contained a waiver of any claims that  
21 could be asserted in connection with any of the work that's  
22 being done.

23 Now, I'm told that these issues were brought to  
24 New GM's attention and New GM has or is in the process of  
25 ensuring through communication with its dealers that the

1 fixing of the switch is not to be conditioned on parties  
2 signing anything that may impact their claims or causes of  
3 action going forward, and that to the extent that people  
4 have already signed anything as a precondition to having  
5 their car dealt with on a recall, that it won't be enforced  
6 or sought to be enforced by New GM.

7 The other thing I want to bring to Your Honor's  
8 attention, and again, it's not within my bailiwick, except  
9 that I've heard enough about it from underlying plaintiffs'  
10 lawyers and have read enough about it is, there is not an  
11 agreement between this side of the courtroom, meaning the  
12 plaintiff's side --

13 THE COURT: Pause please, Mr. Weisfelner.

14 Right after you told me that anecdote, which  
15 troubled me, as it would trouble most folks I think, you  
16 said that when GM, New GM heard about it, it pulled the plug  
17 on that deal -- issue acting that way, and told them, you  
18 didn't use these words, you, jerk, you can't do that. So  
19 why did you tell me that?

20 MR. WEISFELNER: I told you that for at least two  
21 reasons. Having New GM tell the dealers to stop acting like  
22 jerks may or may not cause the new dealers -- the underlying  
23 dealers and the fixers, guys who are dealing with the  
24 recall, to stop acting like jerks. And I just wanted to let  
25 Your Honor know that we are concerned about people acting

1 like jerks on a going forward basis.

2 The second reason I brought it to Your Honor's  
3 attention is, to the extent that people have historically  
4 signed the pieces of paper that the jerks gave them to  
5 review, I haven't seen anything in the record other than an  
6 oral communication that said New GM will not hold those  
7 releases or agreements to arbitrate against the plaintiffs,  
8 I raise it now only because for all of our benefit, we'd  
9 like to see something about this in writing at some point.

10 I brought it up in the context of Your Honor's  
11 concern about presale conduct and post-sale conduct, and  
12 Your Honor, the plaintiffs very much agree that to the  
13 extent that one could readily distinguish between actions  
14 that go to New GM's conduct, that they can't, as Mr.  
15 Steinberg indicated, properly be the subject of the  
16 injunction.

17 But the devil is also in the details on this one  
18 because we're not --

19 THE COURT: Pause for a second. Mr. Steinberg,  
20 I'm going to give you another chance to be heard, why don't  
21 you sit down for now.

22 MR. WEISFELNER: In terms of what constitutes New  
23 GM's actions versus Old GM's actions, you heard at least one  
24 example of how it's difficult, and that is New GM does a  
25 recall and could arguably be replacing the ignition switch,



1 not with a new ignition switch, but with an old ignition  
2 switch, or that parties are concerned that, you know, they  
3 went to their dealer, they got a new ignition switch, they  
4 don't know now whether it was a recalled ignition switch or  
5 an old switch.

6 But, Your Honor, and again, I just mention this,  
7 not because I think it needs to be resolved, or because I  
8 have any evidence to prove it's true, but a lot of what  
9 we're reading suggests that calling this an ignition switch  
10 defect is an impermissible narrowing of what the issues are.

11 The ignition switch may or may not have been the  
12 cause of air bag failure to deploy. The fixing of the  
13 ignition switch, given the electronic calibrations between  
14 the switch and the air bags may or may not address the air  
15 bag problem. I don't know the answer to any of this.

16 Other than to tell you again, when we parse out or  
17 attempt to parse out actions against New GM for New GM  
18 conduct, or things that New GM definitively agreed to assume  
19 as part of the sale process, versus actions that could  
20 arguably or do, in fact, implicate the injunction that's  
21 part of the sale order is, for lack of a better term, easier  
22 said than done.

23 Nevertheless, the plaintiffs as a whole do reserve  
24 the right if this process gets bogged down or takes too  
25 long, to say, you know what, maybe the quickest thing to do

1 is to spend the time and energy that hopefully we won't have  
2 to, to parse through whatever's been filed, and to  
3 demonstrate to Your Honor that the allegations that are  
4 being made, the liability that's being ascribed, and the  
5 damages sought to be obtained as they relate to New GM  
6 conduct do not implicate Your Honor's injunction.

7 For now, however, we'd prefer not to get into all  
8 of those potentially dicey issues, as to what does and what  
9 doesn't constitute a direct claim against New GM that is  
10 outside of the injunction, at least until the parties work  
11 hard on trying to get to a position where the due process  
12 issue gets teed up for Your Honor's consideration.

13 And if we can do that in an effective vehicle and  
14 quickly, then all of the other noise that may be necessary  
15 down the road could be avoided. Because whether it's  
16 actions against New GM or actions that New GM contends  
17 they're not liable for because of the injunction, if the  
18 injunction is dissolved as to this group, because of lack of  
19 fundamental due process, it doesn't matter.

20 So I'd prefer, we collectively would prefer to  
21 deal with that issue as, when and if it does matter.

22 I'm going to skip over the lemon law issues,  
23 because I don't think we have much difference of view with  
24 regard to the answer that you got from Mr. Steinberg. I do  
25 want to stress on your question number four, the inability

1 to get together.

2 The plaintiffs are together, and with the  
3 exception of again one outlier on the issue of what ought to  
4 be part of the threshold and what not be part of the  
5 threshold, there's not a plaintiff group that we're aware of  
6 that isn't prepared to have their interests in the first  
7 instance, represented by one of the three of us, with  
8 consultation with Ms. Cyganowski, subject, of course, their  
9 ability to stand up and say, hey, they didn't present my  
10 issue. But we have a commonality of position, a commonality  
11 of interest, and a desire to work collectively through these  
12 three lawyers.

13 I'm just trying to see if there was anything else.  
14 You've heard our views with regard to an adversary  
15 proceeding versus motion practice. I didn't touch on the  
16 impact on Old GM and the GUC Trust. And I liked Your Honor  
17 took comfort in the fact that Mr. Golden is here, as I do  
18 take comfort any time Mr. Golden shows up anywhere.

19 Look, Your Honor, it's obvious, and you get it,  
20 that one of the arguments that New GM may make is if these  
21 individuals were damaged or deprived of due process, let's  
22 not jump to the conclusion that the right remedy is to have  
23 the injunction not apply to them.

24 Instead let's consider the alternative remedy of  
25 having them all get shifted into the category of late filed

1       claims, judicially acknowledged late filed claims, will now,  
2       as part of a bankruptcy process, go through a procedure for  
3       determining what those claims might be worth individually or  
4       on some class basis.

5               And when that process is all over, then we can let  
6       the GUC Trust and its beneficiaries know that their expected  
7       future dividends may have to be adjusted or wiped out in  
8       order to allow these new beneficiaries of the trust to, in  
9       effect, catch up on distributions that have already been  
10      made, if in fact, that can be done as a matter of  
11      practicality.

12             And I anticipate that holders of the units  
13      including Mr. Golden's clients and others may very well have  
14      an opinion about that.

15             Again, it seems to me that before we ever get near  
16      that thorny issue, where lots of people are going to be  
17      impacted, and it may not be practical, if we resolve the  
18      threshold issue of whether, because of lack of due process  
19      the injunction ought not to apply, then we never get into  
20      this issue. Unless someone were to argue that  
21      notwithstanding the denial of due process the right remedy  
22      is not let the injunction dissolve, but the right remedy is  
23      somehow to treat these people as if they had late filed  
24      claims, and will now just dilute all of the other  
25      beneficiaries of the GUC Trust.

1           Your last point was on mediation, and like Mr.  
2           Steinberg, I agree that litigation is inherently wasteful,  
3           time consuming, and not a very efficient way of resolving  
4           matters, and that whenever possible, mediation is the way to  
5           go.

6           I just am concerned that given where I started,  
7           which is to identify, as I'm sure Your Honor knows, the  
8           multiplicity of investigations that are currently underway.  
9           Just what the role of Ken Fineberg is, just how much money  
10          Mr. Fineberg may have at his disposal to attempt to resolve  
11          issues, while we would collectively prefer to mediate than  
12          litigate, I'm not sure that the environment is such today  
13          that we're presented with that effective choice.

14          Should circumstances change, as I think Your Honor  
15          knows very well, the plaintiffs are as willing to attempt to  
16          resolve issues notwithstanding how prepared they'll be to  
17          prove their cases and collect their appropriate damages.  
18          Thank you, Judge.

19                 THE COURT: All right. Thank you. Mr. Flaxer.

20                 MR. FLAXER: Thank you, Your Honor. I note that  
21                 I'm working in conjunction as co-counsel with the firm of  
22                 Wolf Halthenstein (ph) which is here by counsel.

23                 Perhaps, Your Honor, I should jump right into an  
24                 issue that was maybe the only area where the plaintiff group  
25                 wasn't able to come to complete consensus. And Your Honor

1 added some thoughts to it that I think shed a lot of light  
2 and were actually extremely helpful in my own thinking about  
3 it. Which is in identifying the threshold issues what the  
4 sort of philosophical line of demarcation should be and if I  
5 heard correctly one notion that Your Honor suggested was  
6 things that can be decided on a legal basis, without the  
7 necessity for discovery, but that's -- I'm going to sort of  
8 pause there, and say discovery, we've talked about a  
9 possibility of limited discovery as opposed to more  
10 extensive discovery.

11 So -- and I think that's an important point to  
12 keep in mind. Our view has been that the claim of fraud on  
13 the Court, which the objection to the motion and which our  
14 adversary proceeding both assert, our concern has been that  
15 it's difficult to separate it out from the lack of due  
16 process point because although superficially I suggest it  
17 might be a -- maybe that's not the right word, but it might  
18 be -- it may seem that since fraud on the Court is sort of a  
19 more broad remedy or has more prongs to it that maybe need  
20 to be established that the discovery in establishing that  
21 claim would be much broader and take a lot more time.

22 As I step back from it, and think about it, if  
23 there's going to be discovery on a due process violation, I  
24 think when the actual discovery process gets going, the  
25 discovery on those two claims will be basically the same.

1 And I think Your Honor got into --

2 THE COURT: Wait. I was keeping up with you, Mr.  
3 Flaxer, until you said basically the same. Obviously under  
4 the covers of all this, is that fraud generally is subject  
5 to a time limitation, if I recall correctly, it's one of  
6 your words, fraud on the Court, it's not, and that's the  
7 difference between 60(b) and 60(d).

8 But I wasn't clear after that what the distinction  
9 you were making was.

10 MR. FLAXER: The distinction I'm making is that if  
11 a due process violation is going to be a threshold issue,  
12 and we're going to wind up taking discovery on that issue,  
13 then as a matter of judicial economy, it may be wiser to  
14 include fraud on the Court at that point, because the  
15 discovery is likely to be I think extraordinarily similar if  
16 not identical.

17 THE COURT: I'm not inclined to differ with you in  
18 that regard, Mr. Flaxer, but I thought the consensus until  
19 you spoke was that other folks in the room who spoke before  
20 me thought that due process could be addressed at least in  
21 major respects without any discovery.

22 MR. FLAXER: And if -- and my view on that is, I'm  
23 -- what I would say is, that may or may not be right. So  
24 maybe what we ought to do here to sort of resolve everything  
25 for today at least, is let's proceed with the process of

1 developing stipulations of facts, and lawyers from both  
2 sides will work together on that. And when we come back for  
3 the next time, I think the parties will be able to advise  
4 the Court whether or not they think that based on what's  
5 stipulated, we should just put the due process issue to the  
6 Court, and put fraud on the Court, perhaps to the side for  
7 the moment.

8 But I don't think we ought to decide that one  
9 today, nor do I think we need to. So I don't think there's  
10 any need for any difference of opinion going forward from  
11 today to the next status conference.

12 I will confess some skepticism about whether  
13 stipulations of fact will be sufficient to address the  
14 alleged lack of due process issue, but I'm happy to keep an  
15 open mind about it, because as events develop, we all have  
16 to be prepared to have an open mind and change.

17 So our view for today is, we don't have to decide  
18 whether or not fraud on the Court should be a threshold  
19 issue or not. Let's kick that to the next status conference  
20 and let's see how the process goes with developing  
21 stipulations of fact.

22 And I would add as Mr. Weisfelner very eloquently  
23 observed, there are a number of government investigations  
24 ongoing. I understand that GM's internal report is due  
25 fairly soon, I think in early June. That may shed a lot of



1 light on a lot of issues, and that's another fact on the  
2 ground that may affect our thinking when we get to the next  
3 status conference.

4 Trying to focus on your threshold issues, and  
5 trying not to repeat, I don't have anything to add to the  
6 MDL, that's all been said.

7 As to the dates for when events should happen, we  
8 agree that, you know, on the one hand we want to get in and  
9 out of this court as fast as we can. On the other hand, we  
10 don't want to rush or we're going to wind up right back  
11 before you asking for more time, so we think the dates that  
12 were in Mr. Steinberg's agenda letter are fine, and we're  
13 fine with those.

14 As to a deadline for amending -- I mean, I'm  
15 sorry, for filing additional adversary proceedings or  
16 joining in ours, it was never our intention to encourage  
17 more adversary proceedings, but we did think it was  
18 important that there be a time when the Court be able to  
19 know that. I now know the universe of what the pleadings  
20 are.

21 THE COURT: What people want to assert.

22 MR. FLAXER: Yes. So we're fine with picking a  
23 date for that, maybe a date in mid to late May would be  
24 fine. Mr. Steinberg's agenda letter suggested May 14th as a  
25 date for us to amend our complaint. We are considering

1 three amendments, which we don't think would have any effect  
2 on the process that's being developed here, but we're okay  
3 with that date.

4 Mr. Weisfelner discussed sort of the interplay  
5 between adversary proceedings and the contested matter. I  
6 think that there is agreement here that for discovery  
7 purposes and for the scheduling we're doing here today, they  
8 should be treated as consolidated and run contemporaneously,  
9 and there's no need at this point to have any distinction  
10 that's meaningful that I can think of.

11 I mentioned to Mr. Steinberg this morning in the  
12 hallway that, you know, because we filed a complaint, a  
13 summons has been issued, and there's a date to answer, which  
14 backs into a date for a Rule 26(f) conference. But I think  
15 those dates can be just sort of rolled into this process so  
16 we don't have to have any, you know, separate concerns about  
17 other dates that sort of automatically come with a filing of  
18 an adversary proceeding.

19 THE COURT: I think my understanding then might  
20 flow from what you just said, but you're also equally  
21 amenable to any procedural consolidation, including briefs  
22 to cover the field in both.

23 MR. FLAXER: Correct.

24 THE COURT: Okay.

25 MR. FLAXER: And I think the last point that I

1 have to mention since everything's been so, I must say, very  
2 efficiently covered is we're the ones who did raise the  
3 possibility of mediation. I think I agree with what both  
4 counsel have said before me. I would just urge that we  
5 don't lose sight of it and as much as we'd like to avoid  
6 extensive discovery here, and as much as I'd hope we can  
7 avoid it, but I fear it may not be avoidable, the mediation  
8 alternative may wind up being much more productive and  
9 better for the victims we're all seeking to serve than  
10 extensive litigation.

11 THE COURT: Okay. Thank you.

12 MR. FLAXER: Thank you, Your Honor.

13 THE COURT: Is there anybody else who hasn't had a  
14 chance to be heard for the first time who would like to be?  
15 Come on up, please.

16 I'm taking someone in the courtroom first, and  
17 then I'll ask about the phone.

18 MR. MARTORANA: Good morning, Your Honor, Keith  
19 Martorana of Gibson Dunn & Crutcher on behalf of the GUC  
20 Trust.

21 THE COURT: Did you say Marona?

22 MR. MARTORANA: Martorana.

23 THE COURT: Martorana.

24 MR. MARTORANA: Yes.

25 THE COURT: I'm sorry.

1 MR. MARTORANA: Your Honor, I stand because you  
2 had suggested at the outset of this hearing the possibility  
3 that issues related to the GUC Trust and claims against the  
4 GUC Trust might be better addressed as a threshold issue to  
5 start.

6 Based upon what I'm hearing today, it sounds like  
7 there's a consensus among the parties here at least, that  
8 this is something that should not be addressed as a  
9 threshold issue.

10 THE COURT: Well, that depends on who you're  
11 including within that consensus, Mr. Martorana.

12 MR. MARTORANA: I meant just these parties over  
13 here. Don't -- you would like to have it addressed to the  
14 threshold issue?

15 UNIDENTIFIED: I'll address it later.

16 MR. MARTORANA: Okay. All right. Then I guess  
17 there is no consensus on that, but I will tell you that from  
18 our perspective, we believe that it should not be addressed  
19 as a threshold issue.

20 We do believe that first off it will require at  
21 least some discovery, probably substantial discovery. We  
22 also believe, you know, particularly because as it relates  
23 to issues of excusable neglect, which are fact sensitive.

24 We also believe that it's not dispositive of -- as  
25 Mr. Weisfelner said the -- you know, the fundamental issue

1 here which is whether or not claims can be asserted against  
2 New GM.

3 Moving off it being a threshold issue, we also  
4 don't believe that this is an issue frankly that needs to be  
5 addressed at any point during this hearing -- during this  
6 proceeding.

7 No claimants, none of the plaintiffs, no claimants  
8 or potential claimants had raised this as a possibility. No  
9 one has filed a motion to lift the bar date. The only  
10 person that has raised it has been New GM, based upon, you  
11 know, some statements of fact in some pleadings. But the  
12 only person that has actually moved forward with it is New  
13 GM, and frankly, you know, it's our view that this is  
14 essentially a way to deflect liability away, and you know,  
15 the attention away from New GM and put it on to a third  
16 party.

17 To the extent that Your Honor is inclined to rule  
18 against us and have it either be dealt with as a threshold  
19 issue or as a -- I guess, a subsequent issue, we would  
20 request to participate in any of the discovery that does  
21 transpire. And then to the extent that there are any claims  
22 against New GM to be resolved, we would also ask to  
23 participate in any mediation.

24 THE COURT: Okay. Thank you.

25 MR. FLAXER: Thank you.

1 THE COURT: Let's see, Mr. Golden, Mr. Posner.

2 First you, Mr. Golden, then I'll hear from you, Mr. Posner.

3 MR. GOLDEN: Thank you, Your Honor, Daniel Golden,  
4 Akin Gump Strauss Hauer and Feld, counsel for certain  
5 publically traded public -- publically traded unit trust  
6 holders.

7 Your Honor, I do take your admonition not to pile  
8 on, although my name was used in vain, so I figured I'd  
9 stand for a minute or two, we agree with the position just  
10 advocated by counsel for the GUC Trust.

11 We think it interesting that none of the potential  
12 plaintiffs who might have asserted late claims against a GUC  
13 Trust have indicated an intention to do so. It's only New  
14 GM that has raised that issue.

15 THE COURT: Well, pause please, Mr. Golden.

16 MR. GOLDEN: Yes.

17 THE COURT: You've been around the block a couple  
18 of times.

19 MR. GOLDEN: Too many times.

20 THE COURT: If you were a plaintiff's lawyer,  
21 would you rather collect a hundred cents on the dollar or 30  
22 cents on the dollar? And if I'm allowed to ask a compound  
23 question, would you prefer to try to shoot the moon with a  
24 claim for punitive damages or would you prefer to assert  
25 that punitive damages claim in a bankruptcy where punitive

1 damages come at the expense of the remainder of the creditor  
2 community?

3 MR. GOLDEN: So I'm assuming both of those  
4 compound -- both parts of that compound question were  
5 rhetorical.

6 THE COURT: Yes.

7 MR. GOLDEN: I understand, Your Honor. I  
8 understand the strategy involved, but I think Mr. Weisfelner  
9 is correct. There is a looming threshold issue here. I'm  
10 not here to argue pro or con on that threshold issue, but  
11 that issue once resolved will determine whether there needs  
12 to be claims asserted or attempted to be asserted against  
13 the GUC Trust.

14 I think Mr. Weisfelner was entirely correct, we  
15 actually debated among ourselves whether to either --  
16 whether to even file a letter seeking to participate at this  
17 hearing, because none of this hearing had anything to do  
18 with the Trust or the beneficial interest holders of the  
19 Trust.

20 I was, however, concerned on April 30th, that  
21 somehow some way the GUC Trust was going to be injected into  
22 those proceedings, and therefore, we sent the letter asking  
23 to participate.

24 Sure enough, seven hours later, New GM filed their  
25 letter. And for the first time injected that issue into

1       these proceedings. We don't think it's appropriate. We're  
2       frankly strangers to these proceedings. There may come a  
3       time when the plaintiffs and the claims that the plaintiffs  
4       represent, seek to assert those claims against the GUC  
5       Trust, it's not now. They haven't done so, they haven't  
6       indicated an intention to do so.

7               Furthermore, Your Honor --

8               THE COURT: Pause please, Mr. Golden. Put  
9       yourself -- I made you put yourself in the shoes of the  
10      plaintiffs' lawyers, now I want you to put yourself in my  
11      shoes.

12             Can you see how a judge might be uncomfortable  
13      with a scenario under which there's no claim against  
14      anybody, assuming solely for the purpose of discussion, that  
15      the claim otherwise has merit?

16             MR. GOLDEN: Absolutely, Your Honor. I've said to  
17      my colleagues that you must be struggling at night with  
18      these issues, whether to proceed, allow these claims to be  
19      filed against New GM. If so, then there's no need for the  
20      GUC Trust. But if not, does there -- is there another  
21      remedy available by going against the GUC Trust. I  
22      understand the discomfort of the Court, but that discomfort  
23      was caused by actions taken by other parties.

24             There's often times unfortunate circumstances when  
25      people are deprived of their ability. They fail to assert



1       their rights, they fail to a -- timely assert their rights.  
2       Unfortunate things happen in bankruptcy, Your Honor is well  
3       aware of that, and I understand the discomfort level. But  
4       it doesn't change the fact that to adjudicate whether or not  
5       these claims should be allowed against the GUC Trust will  
6       require a significant amount of discovery.

7               The Pioneer standards themselves that regulate or  
8       determine whether or not there is excusable neglect is ripe  
9       with discovery and evidentiary rationales.

10              So, Your Honor, I think I agree with Mr.  
11       Weisfelner's suggestion, hold this off, it won't be  
12       permanently held off. If Your Honor is to determine that  
13       the plaintiffs can proceed against New GM, that will  
14       probably be the end of it as it relates to the GUC Trust.  
15       If that's not the Court's ruling, we can revisit the issue  
16       if and when it becomes appropriate.

17              But to do it as a threshold issue, when there are  
18       already so many issues on the table, we think is a mistake.

19              THE COURT: Okay. Thank you.

20              MR. GOLDEN: Thank you, Your Honor.

21              THE COURT: All right. Mr. Posner, come on up,  
22       please. Now, I understand that you and your partner, Ms.  
23       Cyganowski are acting as liaison between Mr. Weisfelner, and  
24       Mr. Esserman and Mr. Inselbuch on the one hand, and the  
25       other, I guess it's, I don't know, 50 to a hundred other

1 class action lawyers, do you have some points that you need  
2 to make that Mr. Weisfelner didn't satisfactorily make?

3 MR. POSNER: No, Your Honor, just briefly, David  
4 -- for the record, David Posner from Otterbourg, and as you  
5 pointed out, and as Mr. Weisfelner mentioned I think twice,  
6 Ms. Cyganowski, my partner, has -- is working with that  
7 group as a consultant and a liaison counsel-type role.

8 She asked me to convey to the Court that to the  
9 extent that she can be helpful in harmonizing any discord in  
10 connection with the plaintiffs' group, she stands ready to  
11 assist in that regard. And I would be remiss, Your Honor,  
12 if I didn't say I'm working with co-counsel, Harley Tropin  
13 of the Kozyak Tropin firm who's here today in the court.

14 THE COURT: Okay.

15 MR. POSNER: Thank you, Your Honor.

16 THE COURT: Thank you, Mr. Posner. Mr. Etkin.

17 MR. ETKIN: Your Honor, Michael Etkin, Lowenstein  
18 Sandler for the plaintiffs in two pending class actions.

19 I rise only to talk about an issue that has been  
20 raised and was raised in Mr. Weisfelner's letter of  
21 yesterday, just so I have some clarity.

22 First of all, given the time frame, the number of  
23 lawsuits, the number of lawyers, I think it's extraordinary  
24 that the plaintiffs' side has been able to achieve this  
25 level of cooperation so quickly for purposes of today's

1 hearing. And having dealt in the class action realm for  
2 many years, it is not the usual.

3 Second of all, I have enormous respect for Mr.  
4 Inselbuch and his firm, Mr. Esserman, and his firm and Mr.  
5 Weisfelner and his firm, that goes without say. However, I  
6 just want to quote from the second to last bullet point of  
7 Mr. Weisfelner's letter as it related to the question of  
8 liaison counsel for plaintiffs. And that's --

9 THE COURT: The letter of May 1?

10 MR. ETKIN: His letter of May 1, yes. And that's  
11 what I thought and assumed the state of play was as we  
12 walked into the courtroom today. And it's short.

13 Mr. Weisfelner says, "A majority of plaintiffs has  
14 designated counsel as lead counsel for the May 2nd  
15 conference. Counsel will endeavor to further a continued  
16 coordination amongst plaintiffs. The May 2nd conference  
17 agenda should not include debate about the appropriate  
18 procedures for such coordination, and if necessary, it can  
19 be addressed at a later conference."

20 I agree with that. I think that there's  
21 coordination that still needs to be discussed as we move  
22 forward. These three esteemed counsel were designated to  
23 appear on behalf of a majority of the plaintiffs for  
24 purposes of today's hearing, and I just want to make sure  
25 that I understand the state of play correctly.

1 THE COURT: Well, I take it you're not asking me  
2 for a ruling on that.

3 MR. ETKIN: No. I'm not asking you for a ruling  
4 at all. It's not something that really was placed on the  
5 agenda, and it's really something for the plaintiffs'  
6 counsel and their respective bankruptcy counsel to work out,  
7 to the extent more coordination is necessary.

8 THE COURT: Okay. All right. Anybody else -- oh,  
9 there was a gentleman on the phone if I'm not mistaken.

10 MR. BECNEL: Yes, Your Honor, Daniel Becnel of  
11 Becnel Law Firm. I have since filed in the Eastern District  
12 of Louisiana --

13 THE COURT: Okay. Pause please. Was it Becnel?

14 MR. BECNEL: Becnel, B-e-c-n-e-l.

15 THE COURT: And did you give me a letter, Mr.  
16 Becnel? My prep didn't reflect that letter.

17 MR. BECNEL: No, we did not submit a letter.  
18 We've been on all of the conferences though.

19 THE COURT: I beg your pardon?

20 MR. BECNEL: We've been with all of the conference  
21 calls that all of the lawyers have had together.

22 THE COURT: Well, forgive me, Mr. Becnel, I asked  
23 another attorney to put himself in my shoes, and I'm going  
24 to do the same with you. But frankly I'm not looking for  
25 your understanding. I'm looking for you to understand my

1 ruling.

2 I have before me one full courtroom here, and I  
3 believe I have two overflow courtrooms. And I issued an  
4 order to obviate this exact situation, which every one of  
5 the other lawyers in this entire case was fully able to  
6 comply with, and when I issue an administrative order to  
7 avoid conduct that results in chaos in a case on my watch, I  
8 need the legal community to understand that when I issue  
9 orders, I mean them.

10 So respectfully, I am denying you the opportunity  
11 to be heard. If you have concerns, I'm sure that Mr.  
12 Weisfelner or his colleagues will return your phone calls.  
13 And as you've undoubtedly heard, they're fairly capable  
14 advocates.

15 So I think my ruling is clear. I'm denying you  
16 the opportunity to be heard for failure to comply with the  
17 requirements of my case management order.

18 Mr. Stein -- is there anybody else on the phone,  
19 of course, a person on the phone who has complied with the  
20 requirements of the order?

21 (No response)

22 THE COURT: Mr. Steinberg, you can reply.

23 MR. STEINBERG: Your Honor, I'm going to be very  
24 brief. One, to the extent there was a discussion about  
25 mediation and Ken Feinberg, I want to just make it

1 absolutely clear that Mr. Feinberg has not been retained to  
2 examine the economic losses which are inherent in these  
3 lawsuits. His focus has been on the accident victims.

4 Second, that the accident victims, while not a  
5 part of our motion to enforce, it does not mean that there  
6 -- that our position is not that they are retaining  
7 liability at this point in time for the pre-sale accident  
8 victims only.

9 Third, that I agree with Mr. Weisfelner and Mr.  
10 Flaxer that I think as far as melding the two procedures and  
11 making sure that the adversary proceeding, the contested  
12 matter are all dealt with efficiently, I think we'll be able  
13 to do that and work with each other to do that.

14 I did think Mr. Flaxer had actually a very good  
15 suggestion on the fraud and the court issue, is that once we  
16 go through the stipulated facts and the -- whether there  
17 will be discovery and if so, what narrowly tailored  
18 discovery there will be, then we will be able to evaluate  
19 whether it's still efficient to deal with fraud on the Court  
20 or not as a threshold issue.

21 And so our suggestion would be as Mr. Flaxer has  
22 modified it, is to let us go through the process of  
23 stipulated facts and if we do want to put on fraud on the  
24 Court as a threshold issue because we actually think we can  
25 get rid of it based on a legal theory, and whatever facts we

1 stipulated to, we want to reserve the right to do it. We're  
2 not asking Your Honor to rule on that now or not, but we  
3 would take that up at the next hearing if we're at that  
4 stage.

5 As far as the GUC Trust, the late filed claim, the  
6 reality is that the person who raised this issue was not me  
7 in my letter. The person who raised the issue was the  
8 objector, and I think it was Mr. Weisfelner who claimed a  
9 denial of procedural due process for failure to get notice  
10 of the bar order, and saying that he had no other remedy,  
11 and the only remedy that he could possibly look to is New  
12 GM.

13 The other person who put it on the calendar was  
14 Mr. Flaxer's client, because we've agreed that a threshold  
15 issue is three -- I'm sorry, 60(d)(1), which is that if  
16 there was some kind of a violation, is there -- should there  
17 be an equitable remedy that's fashioned against New GM for  
18 Old GM's conduct.

19 So he's put on the issue as to whether -- because  
20 there's no other opportunity to get any kind of recovery,  
21 that you have to look to New GM.

22 Now, when I said that I didn't concede that this  
23 was a threshold issue or not, it was because it was more  
24 nuanced. I'm not trying to suggest that as a threshold  
25 issue we brief the Pioneer issues. What I am suggesting is

1       that the plaintiffs here cannot make a legitimate procedural  
2       due process argument relating to the bar order if they want  
3       to sleep on their rights and not go against Old GM while Old  
4       GM is still sitting with securities. And I thought that  
5       that needed to be flabbed (ph).

6               And that if it's inherent in the 60(d)(1) issue  
7       that they're going to look to us because they otherwise have  
8       no other remedy, then I think that that is an issue that has  
9       to be dealt with. Having said that, and I don't say  
10       anything more on that issue.

11              I do think, Your Honor, and I wasn't sure why Mr.  
12       Weisfelner went into it, but his concerns with regard to an  
13       issue that I think Your Honor dealt with adequately, which  
14       is dealers who may have tried to put conditions on fixing an  
15       ignition switch, and Your Honor asked essentially, why are  
16       you asking me that, I think New GM clarified that. And as  
17       far as we know, it was one dealer, and it was immediately  
18       dealt with, and when they asked whether there were other  
19       dealers involved, we never got a list for anything else.

20              So I only say that not because it's relevant to  
21       anything here, except that there is press that is listening  
22       to this issue, and everybody likes to say in a very broad  
23       brushed way, New GM is acting irresponsibly. On this  
24       particular issue, we did act responsibly, and on all the  
25       issues I think we're trying to act responsibly.



1           And to the extent that Mr. Weisfelner conceded  
2           that he wasn't a class action lawyer, or a negligence  
3           lawyer, he's probably also not a scientist or an engineer  
4           who could decide whether the air bag issue is one thing or  
5           another thing.

6           I only say that again because the people listening  
7           here, that it should be absolutely clear that you can say  
8           whatever you want to say, but at the end of the day, it  
9           ultimately has to be grounded in fact and a probable claim.

10          Other than that, Your Honor, we appreciate the  
11          time you've given us today.

12          THE COURT: All right. Ladies and gentlemen, I  
13          want you to take a lengthy bathroom break, but hopefully no  
14          more than that. I would like people who are interested in  
15          my resulting directions to be back in 15 minutes. That  
16          would be 25 to 1 on the clock up there.

17          I can't guarantee you that I'll have it buttoned  
18          up all then, but I don't want to impose on you to wait any  
19          more than you need to. We're in recess.

20          (Recessed at 12:21 p.m.; reconvened at 1:10 p.m.)

21          THE COURT: Have seats, please. I apologize for  
22          keeping you all waiting. Here's what we're going to do. In  
23          most respects, it will be similar to my tentatives, but with  
24          some refinements.

25          One, I want to leave as much time for thoughtful

1 briefing and thought by the Court as possible. But at the  
2 same time, I want this to proceed as expeditiously as I can  
3 consistent with fairness. So we're going to consider as  
4 threshold issues the two remaining issues shown on Mr.  
5 Weisfelner's blackline, the discrimination argument, the  
6 possibility that the claims now being asserted may be claims  
7 against Old GM or the GUC Trust, and subject to what I say  
8 momentarily, even the fraud on the Court contentions.

9 Messrs. Steinberg, Weisfelner, Flaxer, Martorana,  
10 and Golden, or their designees, are to confer and to prepare  
11 an order then to be settled on three business days' notice  
12 or overnight mail, consistent with these determinations that  
13 I'm dictating now, but putting meat on the bones, and  
14 providing for agreed upon dates.

15 Two, you're to meet and confer to agree upon facts  
16 to the maximum extent possible, consistent with your  
17 professional duties to your clients. To the extent you need  
18 to agree to disagree, you're to identify the matters that  
19 you can't agree upon and jointly present those identified  
20 matters to me, after which I'll determine the materiality of  
21 what's not agreed on and how it should affect further  
22 proceedings, either by way of authorizing limited discovery,  
23 or by taking issues off the table for now, and determining  
24 them later.

25 As a general matter, we're going to get as far as

1 we can without discovery. And notwithstanding what my case  
2 management order otherwise provides, there will be no  
3 discovery in either the adversary proceeding or the  
4 contested matter until and unless I order otherwise.

5 Three, I consider it preferable to consider the  
6 fraud on the Court claims as early as possible, and at this  
7 juncture, I'm including it as an issue to bring before me as  
8 one of the threshold issues.

9 But I recognize or at least assume that the fraud  
10 on the Court claim is likely to require at least some  
11 discovery. You're to confer and see if you can agree on  
12 limited discovery that will meet your respective needs on  
13 this. I hope, but I'm not sure that you'll be successful.

14 If after good faith discussion, agreeing on  
15 limited discovery is impossible, either side will be  
16 permitted to take the fraud on the Court issues off the  
17 table as threshold matters, and to defer them for  
18 consideration until a later time, assuming that you first  
19 identified the problem to me and gotten my green light to do  
20 so.

21 Four, I agree with Mr. Martorana and Mr. Golden  
22 that the matters involved in compliance with Pioneer are  
23 fact intensive, and are not appropriately threshold issues.  
24 But any party will be free to assert that claims now being  
25 asserted against New GM are prepetition and not post-

1 petition claims.

2 Before any decision is made on the extent to which  
3 the GUC Trust might have to satisfy any of those claims,  
4 each of Wilmington Trust and any holders of GUC Trust units  
5 will have full opportunity to be heard on any and all  
6 issues.

7 Each of Wilmington Trust and any holders of GUC  
8 Trust units, though in the latter case, with the same kinds  
9 of coordination that I expect from the plaintiffs' side,  
10 will have unlimited standing to be heard on not just GUC  
11 Trust related issues, but on any of the issues that we're  
12 considering as part of this exercise; either in the  
13 adversary proceeding or the contested matter.

14 Likewise, in the Wilmington Trust and any holders  
15 of GUC Trust units, again subject to the coordination  
16 requirement, will be free to participate in any discovery I  
17 authorize in connection with the remainder of the issues,  
18 even though I'm not authorizing any such discovery now.

19 But related to that, to the extent Wilmington  
20 Trust told me in our discussion that it had a desire for  
21 discovery, its request for that is denied at this time,  
22 without prejudice to renewal at a time when it's more  
23 appropriate.

24 Five, I will not interfere with the MDL panel's  
25 hearing now scheduled for May 29 and will permit the

1       judicial panel and multi-district litigation to rule on  
2       where pretrial proceedings with respect to any of the  
3       underlying actions might proceed.

4               But this ruling is without prejudice to the rights  
5       of any party to ask me to stay further proceedings before  
6       the transferee judge based on rulings in this Chapter 11  
7       case, or based on any perceived delay in my issuing rulings  
8       in this Chapter 11 case.

9               Six, anyone who is unwilling to agree to the  
10       temporary stand still that the majority seems to agree upon  
11       must come forward before me within a time certain, either on  
12       the date proposed in the Steinberg and Weisfelner letters,  
13       or an alternative date they might agree upon, in  
14       consultation with the other parties that I've allowed to  
15       participate in the formation of the order, with a motion  
16       asking me to rule on whether I should force such a  
17       standstill on the dissenter by TRO or preliminary  
18       injunction.

19               Nothing in the scheduling order will, however,  
20       change the usual burdens associated with getting a TRO or  
21       preliminary injunction relief.

22               Seven, parties are to identify any and all issues  
23       they want me to decide by a date certain to be proposed by  
24       that team who I've designated for that purpose, the same one  
25       that's preparing the proposed form of order, and to state

1       whether or not their issues to be addressed as threshold  
2       issues or not.

3               They are then to confer with the others as to when  
4       any such issues are best decided, whether as threshold  
5       issues or as later issues. If any such additional issues  
6       are to be presented as threshold issues, briefing on them  
7       should be rolled into the briefing, otherwise authorized.  
8       But if they're not perceived to be threshold issues, they  
9       can be deferred with a full reservation of rights.

10              Eight, matters in the adversary proceeding and in  
11       the contested matter will be jointly administered. For the  
12       avoidance of doubt, this will include joint briefing and  
13       joint discovery, if and when any discovery is authorized.

14              Parties should agree upon a preferred place for a  
15       single docket to file all of the documents in connection  
16       with this controversy, and to provide for that in the  
17       proposed order. As far as I'm concerned, either the  
18       adversary or the contested matter will be equally  
19       satisfactory.

20              Nine, other than as I stated, I don't think that I  
21       intended to disapprove anything that had been agreed upon  
22       between Mr. Steinberg and the class action plaintiff  
23       steering committee. But for the avoidance of doubt, if you  
24       think I left something out, or was inconsistent in my  
25       rulings, I would ask that you tell me that now.

1           Ten, the matter of mediation is deferred without  
2       prejudice to anyone's right to raise the issue at a later  
3       time.

4           So, folks, you can take the weekend off, but after  
5       that, please get together as soon as practical to get me an  
6       agreed upon form of order, at least agreed upon between the  
7       people I mentioned, then to be settled. That order should  
8       take care of details, such as proposed dates, which I've  
9       intentionally left out of the rulings I just announced. I  
10      think you can and should meet your needs and concerns on  
11      that.

12           Now, not by way of reargument, I suspect that  
13      there may be some details I failed to address or some loose  
14      ends, and I'll allow people to be heard on that.

15           Mr. Steinberg?

16           MR. STEINBERG: Your Honor, I think I can deal  
17      with everything you said. The only thing is, do we talk to  
18      your chambers about the next status conference date, or do  
19      you want to give us the date and we'll try to back into to  
20      the sum of the requirements before then?

21           THE COURT: My preference, I think, Mr. Steinberg,  
22      is that we do it as an iterative process. You guys, after  
23      you've figured out the time you need, tell me what you would  
24      recommend as far as a date within a zone. Thereupon my  
25      courtroom deputy, Ms. Calderone will see how it fits into

1 the schedule. She'll advise you what we're in a position to  
2 do, and then you can either massage your dates, or plug the  
3 date we give you into the order that you settle.

4 MR. STEINBERG: That's acceptable, thank you.

5 THE COURT: Okay. Anything else? Mr. Esserman,  
6 were you rising to be heard in any way?

7 MR. ESSERMAN: No, thank you, Your Honor.

8 THE COURT: Oh, okay. All right. Does anybody  
9 have anything else?

10 (No response)

11 THE COURT: No. Okay. Thank you very much.  
12 We're adjourned.

13 (Proceedings concluded at 1:22 PM)

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I N D E X

R U L I N G S

IDENTIFICATION

PAGE

Judge's ruling

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C E R T I F I C A T I O N

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# Exhibit 6

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Case No. 09-50026-mg  
. Chapter 11  
.   
MOTORS LIQUIDATION COMPANY, . (Jointly administered)  
et al., f/k/a GENERAL .   
MOTORS CORP., et al, . One Bowling Green  
. New York, NY 10004  
Debtors. .   
. Wednesday, November 16, 2016  
. 11:38 a.m.  
. . . . .

TRANSCRIPT OF CASE MANAGEMENT CONFERENCE (CC: DOCUMENT NUMBER  
13786, RELATED DOCUMENT(S) 13373, 13775, 13697)  
BEFORE THE HONORABLE MARTIN GLENN  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 (Proceedings commence at 11:38 a.m.)

2 THE COURT: All right. The next is Motors  
3 Liquidation Company, 09-50026.

4 Let's wait until everybody gets settled, Mr.  
5 Steinberg, okay?

6 All right. Let me get the appearances from those who  
7 are going to speak.

8 MR. BABCOCK: Your Honor, Russell --

9 THE COURT: Okay. Let me do the people in the  
10 courtroom first, okay?

11 Go ahead, Mr. Steinberg.

12 MR. STEINBERG: Arthur Steinberg and Scott Davidson,  
13 King & Spalding, on behalf of New GM.

14 MR. WEISFELNER: Good morning, Your Honor. Edward  
15 Weisfelner, Brown Rudnick, on behalf of the co-lead counsel and  
16 the MDL, sometimes referred to as designated counsel for the  
17 economic loss plaintiffs.

18 THE COURT: Thank you.

19 MR. WEINTRAUB: Good morning, Your Honor. William  
20 Weintraub of Goodwin Proctor, also as designated counsel for  
21 the pre-closing ignition switch plaintiffs and for certain  
22 post-closing non-ignition switch plaintiffs.

23 THE COURT: Thank you.

24 MR. PELLER: Good morning, Your Honor. Gary Peller  
25 for the Elliott, Sesay, and Bledsoe plaintiffs, who include pre



1 and post-sale economic loss and personal injury and property  
2 damage plaintiffs.

3 THE COURT: Thank you, Mr. Peller.

4 MR. KARLAN: Good morning, Your Honor. Mitchell  
5 Karlan from Gibson, Dunn & Crutcher for the GUC Trust.

6 MS. NEWMAN: Good morning, Your Honor. Deborah  
7 Newman from Akin, Gump, Strauss, Hauer & Feld on behalf of a  
8 group of unaffiliated participating unitholders in the GUC  
9 Trust.

10 THE COURT: Thank you. Anybody else in the courtroom  
11 making an appearance?

12 All right. Anybody on the phone making an  
13 appearance?

14 MR. BABCOCK: Yes, Your Honor. Russell Babcock  
15 appearing on behalf of creditor, Benjamin Pillars.

16 MR. JARDINI: Good morning, Your Honor. Andre  
17 Jardini and K.L. Myles of Knapp, Petersen & Clark for the  
18 Corvette economic loss plaintiffs.

19 MR. HIRSCH: Good morning, Your Honor. Joram Hirsch,  
20 Adelman, Hirsch & Connors, for the plaintiff -- for the  
21 Pitterman plaintiff.

22 MR. LEDFORD: This is Kris Ledford of Ledford Law  
23 Firm for the Pope plaintiffs, which were brought in under the  
24 --

25 THE COURT: Just say that again. I'm sorry, I didn't



1 hear you.

2 MR. LEDFORD: Kris Ledford for the Pope plaintiffs.

3 We were brought in.

4 THE COURT: No, that, I heard. I thought there was  
5 somebody after you, Mr. Ledford.

6 MR. LEDFORD: Okay. I'm sorry.

7 THE COURT: Anybody else on the phone making an  
8 appearance?

9 All right. Mr. Steinberg.

10 MR. STEINBERG: Your Honor, I'm -- I want to be able  
11 to try to give you a little more background as to how this was  
12 developed, and I'm going to try very hard not to try to argue a  
13 position as compared to try to give you context because this is  
14 set up for a briefing opportunity, and at that point in time,  
15 I'll present my argument more formally, and if there's oral  
16 argument, I'll be able to present it, as well. And just -- if  
17 you just leaf through the status report, you'll --

18 THE COURT: I did that several times yesterday.

19 MR. STEINBERG: -- you'll see that there is a number  
20 of footnotes on the first couple of pages, which have  
21 definitions. And I think just Your Honor appreciates why that  
22 has occurred.

23 When this matter was originally argued in front of  
24 Judge Gerber, we used certain type of nomenclature. In the  
25 context of the MDL this year, the plaintiffs have tried to



1 introduce new nomenclature. What you're getting on these  
2 footnotes is our trying to stay with the original nomenclature,  
3 and designated counsel for the economic loss plaintiff's trying  
4 to introduce its new nomenclature and primarily relates to what  
5 they call the second ignition switch -- second-stage ignition  
6 switch plaintiffs.

7           And I understand what they're doing and I didn't want  
8 to quarrel with it, but I wanted to explain to Your Honor why  
9 you're seeing two sets of definitions. Ultimately, when we --  
10 if we get to the stage where we're drafting something, we'll  
11 have to agree to a convention as to what the right terms are so  
12 that Your Honor will have a clear record, but that's what you  
13 see when you have it here.

14           You also see from the background section that we  
15 originally started this process with the designated counsel,  
16 Mr. Weisfelner and Mr. Weintraub, and then we broadened it to  
17 what we call the core parties. And to date, the people who  
18 have gotten the status report, which is publicly filed, are the  
19 core parties, and the core parties are in paragraph 3. And you  
20 could see there, it is not just the people who had  
21 traditionally appeared before Judge Gerber, as well, but we  
22 included all the parties that were subject to pending motions  
23 to enforce, of which I think there are three. And that's why  
24 you have some of the counsel on the phone that have  
25 participated or at least are listening to it. So they -- some





1 of them presented issues and some of them have voiced their  
2 views.

3 In paragraph 6, we try to -- to try to give Your  
4 Honor a feeling of what's going on in other courts as they  
5 relate to what we're asking you to decide here because there is  
6 an overlap and we wanted to make sure that Your Honor  
7 understood it, and I apologize because I think that because of  
8 the flurry of activity that took place in the MDL at the very  
9 end of the last week, I don't know whether we have given you,  
10 as we normally do, some of the relevant pleadings in the MDL.  
11 But on Friday, the -- New GM filed its brief, its opening  
12 brief, on the successor liability issue. So to the extent that  
13 Your Honor has an interest in it, usually Your Honor collects  
14 the paper, then we would be happy to do that, as well, too. I  
15 don't think we did that.

16 THE COURT: Let me ask you this, Mr. Steinberg,  
17 because on page 18 of this status report, in paragraph 6, you  
18 say if there are any -- if there are unresolved issues after  
19 Judge Furman has rendered his decision on the successor  
20 liability issue, should this Court decide any successor  
21 liability issues? So what is it that's before Judge Furman?  
22 What is he being asked to decide?

23 MR. STEINBERG: The fourth amended consolidated  
24 complaint before Judge Furman was filed by the economic loss  
25 plaintiffs, so it doesn't have any accident component to it.



1 The general thrust of the complaint that was filed says that  
2 for ignition switch plaintiffs, there should be successor  
3 liability based on the continuous enterprise exception to  
4 successor liability. They don't argue fraud on the court or,  
5 you know, some kind of fraud in the transaction. They don't  
6 argue that this was assumed. They argue basically the  
7 continuous enterprise. And then, there are 16 states that are  
8 being briefed. New GM, in its opening brief, argued for  
9 federal choice of law and then saying that either Delaware or  
10 New York applies. I assume that when we see their responsive  
11 brief, they will say that other laws apply. And in the context  
12 of those other lies, some of 16 jurisdictions have other  
13 exceptions to successor liability. I think one of them may  
14 have something called a continuing enterprise exception.

15 THE COURT: At some point, I read some -- a prior  
16 decision by Judge Furman where I thought that he had dealt with  
17 economic loss claims and focused on the law. Several states --  
18 I may am misremembering what I read. It was some months ago.

19 MR. STEINBERG: There was another decision by Judge  
20 Furman, I think, and I'm sure someone will correct me if I'm  
21 wrong. I think it related to a motion to dismiss, so he  
22 briefed -- people briefed it under a number of different  
23 states, and it generally dealt with the issue as to whether  
24 their theory of damages that --

25 THE COURT: Yes, that was the decision I read.



1 MR. STEINBERG: -- on a brand basis, would apply, and  
2 then people briefed the brand damage issue under various states  
3 and Judge Furman wrote a ruling on that.

4 THE COURT: All right. So what is the -- just to --  
5 what's the successor liability issue that you think this Court  
6 will be asked to decide?

7 MR. STEINBERG: Well, Your Honor, we put it as a  
8 deferred issue because it may not be anything, right, so -- but  
9 in accident cases, compared to an economic loss case, they may  
10 argue that in their particular jurisdiction that they are more  
11 apt to be able to utilize something like the product line  
12 exception. And I think one of the arguments that we've made  
13 before Judge Furman is that the product line exception does not  
14 apply to an economic loss-type case.

15 THE COURT: Okay.

16 MR. STEINBERG: So there could be some fallout here,  
17 but obviously people feel, as a general matter, that Judge  
18 Furman's decision on successor liability on the continuing  
19 enterprise exception will have a great deal of relevance of  
20 what might happen here because if Your Honor -- because if  
21 Judge Furman decides that there is no successor liability  
22 finding, then some of the dispute, in our belief, with regard  
23 to non-ignition switch plaintiffs as to whether they can  
24 approve a due process violation -- if all you do by  
25 accomplishing as a due process violation is to bring a



1 successor liability claim and Judge Furman has already ruled  
2 that there is no such successor liability claim, then --

3 THE COURT: So when's the briefing supposed to be  
4 complete before Judge Furman?

5 MR. STEINBERG: I think their brief is due in --  
6 sometime in December, and then our reply brief is due sometime  
7 in January. So it's on a fairly fast track. I think it'll be  
8 fully submitted before February, and then the question is  
9 whether they'll hear oral argument or not.

10 THE COURT: All right.

11 MR. STEINBERG: So you have the successor liability  
12 issue, which we refer to in paragraph 6 of the status report,  
13 which is going on in the district court.

14 Yesterday -- and we will send this to Your Honor, as  
15 well, too -- the appeal of Judge Gerber's December judgment by  
16 what I'll call the Adams plaintiffs was filed before Judge  
17 Furman, as well.

18 THE COURT: I got ECF notice of a filing of that  
19 brief because it was an appeal from Judge Gerber. So in  
20 theory, I'm supposed to get automatically, and so I think I  
21 actually printed out that brief.

22 MR. STEINBERG: Okay. So --

23 THE COURT: It's only the one brief so far that's  
24 been filed.

25 MR. STEINBERG: That's correct. And I think our



1 brief is due sometime again in December, December 21, and then  
2 their brief, their reply would be due sometime in January. So  
3 that also is on a fairly aggressive briefing schedule and -- to  
4 be resolved. And the issue in that appeal, which I think is  
5 referenced in the status report, is they argue that they didn't  
6 get to file a proof of claim in the bankruptcy case because of  
7 some New GM conduct after the sale, and therefore they thought  
8 they had an independent claim or some type of claim related to  
9 that, and we're briefing that issue for Judge Furman.

10 THE COURT: All right.

11 MR. STEINBERG: The third issue which is referenced  
12 in paragraph 6, which is not on an aggressive briefing  
13 schedule, but I want to put that into context, is that Judge  
14 Furman has set dates for when he will hear class certification  
15 issues and summary judgment issues, and I think those dates  
16 actually have their ending briefs sometime in the spring of  
17 2018. And the reason why I mention that -- those types of  
18 procedures, because in the event that this Court will deal with  
19 issues relating to a claim, then issues relating to class  
20 certification of a late-filed claim, issues relating to the  
21 merits of a claim, will overlap with some of that briefing that  
22 is there. So when I get to the --

23 THE COURT: We'll come to the late-filed claim --

24 MR. STEINBERG: Right.

25 THE COURT: -- issue.



1 MR. STEINBERG: But I just wanted to put into context  
2 why we referenced that.

3 THE COURT: Let me deal first with an issue because I  
4 see there are -- there's disagreement, put it that way, as to  
5 who should be a part of any proceeding here. And you've  
6 included, on page 8 of the status report, proposed language  
7 that you think should go into an order to show cause. And, you  
8 know, I asked myself the question, is an order to show cause  
9 effective to compel parties to whom it -- assuming that  
10 personal jurisdiction did not previously attach, to appear and  
11 respond to the order to show cause. So one of the things --  
12 and some of the people have said, well, there needs to be an  
13 adversary proceeding. The plan has an injunction, correct?

14 MR. STEINBERG: The sale order has --

15 THE COURT: The sale order has an injunction.

16 MR. STEINBERG: Correct.

17 THE COURT: All right. And Rule 7001(7) says a  
18 proceeding to obtain an injunction or other equitable relief,  
19 except when a chapter 9, chapter 11, et cetera, plan provides  
20 for the relief. So you don't need an adversary proceeding.  
21 Does the plain incorporate by reference the sale order?

22 MR. STEINBERG: I think it does. I think it does.  
23 But Judge Gerber actually ruled on this issue before as to  
24 whether -- and I think the Second Circuit opinion actually  
25 dealt with this issue as to whether, on a formalistic basis, we



1 needed to bring these actions by an adversary proceeding or  
2 whether it could be done as an injunction to enforce an  
3 existing order of this Court. And Judge Gerber clearly held  
4 that you can do this by contested matter and motion --

5 THE COURT: What -- to me, the objections that  
6 7001(7) really deals with this issue. An adversary proceeding  
7 is not required.

8 MR. STEINBERG: Right.

9 THE COURT: Okay. Then the issue becomes, well, what  
10 about people who claim they didn't get notice before, all  
11 right, and they didn't participate in any of the prior  
12 proceedings. And I'll hear argument about it, but my reaction  
13 is, okay, we're going to serve them now. Okay. And if the  
14 issue whether the injunction in the sale order should be  
15 enforced, if they're given -- if you serve them under Rule 7004  
16 -- just had that argument before about what that requires,  
17 right? If you serve them under 7004, they can be brought in as  
18 a party to a contested matter. Ordinarily, it's triggered by a  
19 motion, but can also -- an order to show cause has the same  
20 effect.

21 MR. STEINBERG: Your Honor, this procedure was  
22 utilized by Judge Gerber in connection with the December  
23 judgment. He did it by a September 3, 2015 order to show  
24 cause.

25 THE COURT: And did you serve everybody?



1 MR. STEINBERG: And we served everybody who had a  
2 pending litigation.

3 THE COURT: And some chose not to appear.

4 MR. STEINBERG: And some chose not to appear. And  
5 one of the issues that they have a perfect right to argue is  
6 that they're not bound by that judgment because they felt that  
7 we did something wrong, and that's issue number two. And they  
8 could argue that.

9 We're prepared to defend what we have done, and the  
10 language about binding everybody was the same type of language  
11 that Judge Gerber had put into his order. And one of the  
12 issues that happens in this case and that we struggle with is  
13 that notwithstanding the sale order and our interpretation of  
14 the sale order, people continue to file litigation. So even if  
15 Your Honor had ruled on this issue, in 2017, someone may file  
16 another complaint against GM and then say, I was never party to  
17 the action before. The --

18 THE COURT: Well, I'll hear -- if people have  
19 argument on that, I'll hear it, but my initial reaction is  
20 exactly that. If you serve them, they can be brought here, and  
21 an issue will be are they bound by the prior rulings by Judge  
22 Gerber or not. That'll be an issue that -- and seems to me  
23 that that is a threshold issue.

24 MR. STEINBERG: That's correct. And, Your Honor, we  
25 want to serve, in effect, the entire litigation docket --





1 THE COURT: I'm sure you do.

2 MR. STEINBERG: -- to make sure that whatever Your  
3 Honor ruled will be binding on everyone because, to be candid,  
4 if Your Honor ruled against us, it's affirmative collateral  
5 estoppel against us. If you ruled for us, if I hadn't served  
6 them, it's not necessarily the same type of effect the  
7 collateral estoppel. So in order for me to get what I want to  
8 have, I need to serve as broad as possible. And if someone  
9 thins we hadn't done it before, they will have that opportunity  
10 to brief it to Your Honor as to why they should or should not  
11 be subject to prior rulings, and we will also then decide  
12 whether they still will nevertheless be subject to these  
13 existing rulings.

14 THE COURT: Okay.

15 MR. STEINBERG: So the other thing that I just wanted  
16 to mention, which I don't think is actually in the papers, is  
17 that the GUC Trust actually made another distribution of its  
18 funds in the last couple days.

19 THE COURT: I think I got the report of it.

20 MR. STEINBERG: Okay. So -- and when we defined the  
21 threshold issues, we were trying carefully not to have anything  
22 to have -- that involves discovery, something that could be  
23 teed up as, in effect, a straight legal issue to Your Honor,  
24 and I think the -- at least the designated counsel, while maybe  
25 quarreling with the way we phrased an issue, has endorsed the



1 notion of a threshold issue and a deferred issue primarily for  
2 the reasons that I've talked about before, which is that  
3 actions that are going on in the district court -- and these  
4 rulings will then define who are the non-ignition switch  
5 plaintiffs that may be able to take advantage of the Second  
6 Circuit opinion and may or may not be bound by Judge Gerber's  
7 December judgment. So with that --

8 THE COURT: Tell me -- focus on the non -- and maybe  
9 -- I'll ask your view and then we'll hear from other counsel  
10 about the non-ignition switch plaintiffs. What is it that  
11 you're asking me to decide as a matter of law without  
12 discovery? Because it did seem to me that the Second Circuit  
13 opinion necessarily, with their remand and lack of decision  
14 about non-ignition switch plaintiffs, in determining whether  
15 they have a due process argument that they're not bound, isn't  
16 that a fact-specific inquiry?

17 MR. STEINBERG: There are two issues that we've  
18 identified on non-ignition switch plaintiffs which we believe  
19 are threshold issues, which defines the scope. One was Judge  
20 Gerber rendered the April 2015 decision, June judgment, which  
21 was the decision that went up to the Second Circuit. The  
22 people who appealed that decision were specific parties. There  
23 was designated counsel for the ignition switch plaintiffs.  
24 There was counsel for the pre-sale accident plaintiffs on the  
25 ignition switch side. And then, there was Mr. Peller, who had,



1 as part of his 12 clients, had one or two that had non-ignition  
2 switch plaintiffs there. So when the Second Circuit ruled  
3 whatever it ruled and -- then the question was who was it  
4 ruling on behalf of, was it ruling solely on behalf of the  
5 appellants that were before it or was it making a broader  
6 pronouncement that would be binding and for the benefit of all  
7 non-ignition switch plaintiffs, and does a court of appeals get  
8 to rule on something greater than the issues that were  
9 presented before it? That's one set of issues.

10           The second thing was that when Judge Gerber realized  
11 that he was going to be retiring at the end of 2015, he had  
12 said to the parties, I want to wrap up everything that you  
13 think I may need to wrap up as part of the GM proceedings, and  
14 what happened after he rendered his June judgment is that there  
15 was this concept of -- where the parties believed they were  
16 bound by that June ruling. And so he was getting a flurry of  
17 papers by people who said, I am not bound. So he said, you  
18 know what, stop with sending me papers, let's get it all  
19 resolved at one time. And then, that led to proceedings and  
20 October 14th oral argument, November decision, December 3  
21 judgment. That was appealed by only a limited amount of  
22 people.

23           And in that November decision, he had specific  
24 rulings with regard to non-ignition switch plaintiffs,  
25 basically saying, in our view, that they had their opportunity



1 to allege whatever due process violation. They didn't allege  
2 it, and therefore they can't assert independent claims.

3 THE COURT: Let me ask you this. So the Second  
4 Circuit decides what it decided. And would you agree that that  
5 is a subsequent decision to what Judge Gerber decided and  
6 reflects a change in the law from what he found with respect to  
7 due process?

8 MR. STEINBERG: That --

9 THE COURT: Here's where I'm going, Mr. Steinberg.  
10 Wouldn't those parties who hadn't -- who did not appear,  
11 wouldn't they have an argument in this Court under Bankruptcy  
12 Rule 9024, which incorporates Rule 60, and wouldn't this be a  
13 60(b)(6), any other reasons that justify relief where there's  
14 been a subsequent change in the law, so wouldn't -- I'm not  
15 deciding it now, but I know you're -- you have set out in the  
16 issues, are they bound, if I agree that's an issue? Are those  
17 who did not appeal bound by Judge Gerber's decision, which they  
18 didn't appeal?

19 And it does seem to me that if the Second Circuit, to  
20 the extent it pulls the rug out from under the prior decisions,  
21 those people who didn't join in the appeal would have an  
22 argument under 9024 that based on a subsequent change in the  
23 law, they should be relieved from the judgment. Do you agree  
24 that would be an issue? I'm not saying -- I'm not deciding it,  
25 but you're putting a lot of weight on the argument that, well,



1 hey, they didn't appeal, it's tough luck, they're out of luck,  
2 even if there's a change in the law subsequently, it's too bad  
3 for them because they didn't appeal it.

4 MR. STEINBERG: Well, I think, Your Honor, that the  
5 answer is not as simple as Your Honor has presented and that --

6 THE COURT: I'm not deciding an issue.

7 MR. STEINBERG: I understand, but to --

8 THE COURT: You made it seem like it was crystal  
9 clear that, of course, they can't --

10 MR. STEINBERG: No, no. All I tried to do was to say  
11 what the issue was.

12 THE COURT: Okay.

13 MR. STEINBERG: I assume that the other side will  
14 tell me that I'm wrong and Your Honor will -- ultimately will  
15 have to decide. I'm just trying to identify the issue for you,  
16 which is that -- one issue is --

17 THE COURT: I agree that an issue -- and I would  
18 agree that it is a threshold issue whether parties who didn't  
19 appeal are bound by the earlier decision and judgment.

20 MR. STEINBERG: Right. And there's --

21 THE COURT: I'm not necessarily framing it exactly,  
22 but I think that's an issue.

23 MR. STEINBERG: And just to put the context that at  
24 least I'd like you to think about, and I'm sure others will  
25 tell me again why they think I'm wrong, the Second Circuit



1 ruling had nothing to do with the December judgment, and there  
2 were other parties, not economic loss plaintiffs, that were  
3 involved in the December judgment. And their failure to  
4 appeal, we think, has consequences. And while the Second  
5 Circuit said the non-ignition switch plaintiffs may have been  
6 required an opportunity to also show -- that they can show due  
7 process violation, the December judgment that Judge Gerber  
8 ruled said they had another six months to say something and  
9 they didn't say something and bring out to me, and so I would  
10 argue and I will argue that the December judgment was something  
11 totally different than what the Second Circuit was ruling on,  
12 and they actually didn't have the benefit of what went on  
13 there.

14 THE COURT: That's fine.

15 MR. STEINBERG: And the only other thing that I would  
16 say is that -- and you will see it cited in papers and for and  
17 against, is the application of the Supreme Court decision and  
18 in the Travelers case, where they reversed one of the Manville  
19 decisions and basically said that courts can exceed -- lower  
20 courts can exceed their subject matter jurisdiction, and if  
21 it's not appealed upon, it is the final order. The only people  
22 who preserve that are the people who have raised the due  
23 process issue, and if they had the right to assert a due  
24 process issue and they didn't do it, then they've waived that  
25 right to --



1 THE COURT: Well, 9024 and Rule 60 would seem to run  
2 counter to that argument, potentially.

3 MR. STEINBERG: Except the Supreme Court in that case  
4 -- and again, I said I didn't really want to argue with that,  
5 but the Supreme Court said that there's a policy reason for  
6 finality of judgments and they look to enforce that.

7 THE COURT: All right.

8 MR. STEINBERG: And so Your Honor would have to  
9 decide whether, notwithstanding that precedent, this should be  
10 approached in a different way. And I'm sure others will try to  
11 argue why that is wrong, but that's clearly an issue that we  
12 need to have Your Honor look at because you need to define the  
13 set, the universe of people who are non-ignition switch  
14 plaintiffs who can assert whatever the rights that they want to  
15 assert are.

16 So that is the -- one of the threshold issues that  
17 people have identified. Again, I think we've had the back and  
18 forth on the procedure. We're happy to do whatever the  
19 procedure is, but we think the order to show cause is the most  
20 efficient way. I think designated counsels agree that that's  
21 okay. I think Mr. Peller has raised an issue about why that  
22 shouldn't be the case, but he's been involved in these  
23 proceedings since --

24 THE COURT: Mr. Weintraub, on behalf of certain non-  
25 ignition switch post-closing accident plaintiffs, he had --



1 this is on page 11 of the status report. He thinks -- he  
2 phrased an issue, are non-ignition switch plaintiffs barred  
3 from asserting independent claims against New GM because they  
4 purportedly did not appeal, et cetera.

5 MR. STEINBERG: It's the same thing. I think --

6 THE COURT: Do you agree? I mean, you seem to resist  
7 listing that as an issue. Why isn't that -- I mean, it seemed  
8 to me that that is a genuine threshold --

9 MR. STEINBERG: No, no, no. I think it's the same  
10 issue that I've read -- I've written right before the Goodwin  
11 Proctor position. I think, to be candid, what's happening here  
12 is that people wanted to educate Your Honor as to how this  
13 issue should be thought of, so they wrote a longer recitation  
14 to it. But when you look at the actual issue that they're  
15 prepared to brief on, the designate --

16 THE COURT: That's really a pretty concise statement  
17 of the issue that Mr. Weintraub --

18 MR. STEINBERG: Well, yeah, but I don't -- I think  
19 ours is an equally concise statement, and I think designated  
20 counsel also wanted to rewrite the issue on the appendix. So  
21 they have something else, as well, too. But I think we're all  
22 saying the same thing, and ultimately --

23 THE COURT: I wish you did. It would have made life  
24 a lot easier.

25 MR. STEINBERG: Well --





1 THE COURT: I couldn't believe it took a 19-page  
2 status report to identify issues that -- I don't know whether  
3 you really agree or disagree or not. I mean, just --

4 MR. STEINBERG: Well, part of --

5 THE COURT: All this is framing the issues and you're  
6 going to brief -- besides, you're going to brief it and --

7 MR. STEINBERG: I accept that --

8 THE COURT: I'm expressing a bit of frustration.

9 MR. STEINBERG: I accept that, Your Honor, but to  
10 understand it from our side, I didn't want anybody saying that  
11 we were not properly presenting their sentiment, and therefore  
12 you get another five pages of this draft because people want to  
13 frame the issue in the way that they want and some people  
14 wanted to argue that these aren't even issues that you should  
15 be thinking about. And so I thought I needed to present that.  
16 The other five pages was to explain what we did from the July  
17 status conference, and I thought the record needed to reflect  
18 that. but I do recognize --

19 THE COURT: I kept wondering what happened after the  
20 July status conference because I thought I was being ignored.  
21 I saw all these status reports before Judge Furman, and then I  
22 saw the one that finally triggered my entry of the order  
23 because you told Judge Furman what you were going to do here,  
24 except you hadn't even told me about it yet.

25 MR. STEINBERG: Well, Your Honor, the -- there was a



1 bellwether case that was before Judge Furman which was coming  
2 up to a trial in September, and one of the issues that was  
3 going to be in that bellwether trial was whether they can  
4 assert a successful liability claim, and I think we actually  
5 had written to Your Honor asking for a status conference before  
6 that bellwether trial, which was never scheduled, and it so  
7 happened that after we filed our brief on successor liability,  
8 they withdrew the successor liability cap and the case was  
9 ultimately settled. But --

10 THE COURT: All right. Let me hear from other  
11 counsel.

12 MR. STEINBERG: Okay. Do you want to hear about the  
13 other issues or is it self-evident from --

14 THE COURT: Let's see if we can get through this, and  
15 then we'll -- then you can back up, okay?

16 MR. WEISFELNER: Good afternoon, Judge. Ed  
17 Weisfelner, Brown Rudnick, on behalf of the MDL co-leads,  
18 appearing principally on behalf of economic loss claimants.

19 Your Honor, look, I do think that there is very close  
20 to dangerous agreement among us and New GM on what the  
21 threshold issues ought to be. We may frame them a little bit  
22 differently, and I take Mr. Steinberg's contention to heart  
23 that we chose to frame it a little bit differently because we  
24 were looking to educate the Court a little bit more.

25 THE COURT: You would never do that, would you?



1 MR. WEISFELNER: We tend to want to avoid that  
2 whenever we can. But I do think it's important that we  
3 highlight for you, in the context of this status conference and  
4 going down the list of the comments that Mr. Steinberg made.

5 THE COURT: I will have forgotten about this when I  
6 get to read the briefs that are really going to be the basis  
7 for the arguments.

8 MR. WEISFELNER: I'm sure you will.

9 THE COURT: So you're fencing about words here and  
10 there.

11 MR. WEISFELNER: No. That's right, and I'll do this  
12 quickly. Mr. Steinberg talked about sets of definitions, and  
13 that's why we had so many footnotes in the status report. And  
14 clearly, there is a difference between what they refer to as  
15 "ignition switch plaintiffs," what we tend to refer to as  
16 "first wave." And the difference is the number of cars that  
17 are involved.

18 Your Honor will come to learn, or you already know,  
19 that in the first wave of recalls, the first few recalls that  
20 GM did, there were approximately 2- to 3 million cars that were  
21 the subject of that recall. The second set of recalls, all  
22 done within the same 30 or 45 days, ultimately brought the  
23 number of recall vehicles up to 27 million. Put that in  
24 context, there were 70 million GM cars on the road.

25 THE COURT: How does that make a difference in terms



1 of the issues I have?

2 MR. WEISFELNER: Because we take the position that  
3 the four threshold issues that were before Judge Gerber dealt  
4 specifically and exclusively with the first set of recalled  
5 vehicles, those being the first-wave ignition switch defect  
6 vehicles.

7 Now, we come to the Second Circuit opinion, and in  
8 our view -- and frankly, if you take a look at the procedural  
9 background in Judge Gerber's decisions, he very rarely makes a  
10 distinction, if ever, between first wave and second wave. He  
11 talks about 70 million cars. He talks about 27 million cars.  
12 Likewise, the Second Circuit, in its preamble to its ultimate  
13 holding, talks about 27-odd million cars and 70 million cars.  
14 There's never a distinction in the Second Circuit opinion  
15 between first wave and second wave.

16 Then we have the last category, what we call the non-  
17 ISD, non-ignition switch defect plaintiffs. Mr. Steinberg and  
18 New GM says your second wave are in the same boat as the non-  
19 ISDs. So there's only two categories, ISD, the 2 million cars,  
20 and everything else, whether they involve a so-called ignition  
21 switch or a seatbelt or a safety harness, you're all non-  
22 ignition switch defect claimants. And where we think this is  
23 critically important is on what it is the Second Circuit  
24 announced that we think has broad permutations.

25 The Second Circuit talked about two things, lack of



1 due process, whether you need prejudice or not, and a finding  
2 that there, in fact, was prejudice. We have a disagreement as  
3 to whether or not that applies solely to the 2 million cars  
4 that were in the first wave or whether it applies to all  
5 ignition switch defect claimants. To a large extent, I think  
6 that that needs to be a deferred issue because Judge Furman, in  
7 addition to all of the other things he's looking at, is also  
8 going to consider what additional discovery, if any, are the  
9 plaintiffs entitled to or do they need with regard to the issue  
10 of whether or not their defect, like the defect -- and I don't  
11 know what the difference is between an ignition switch defect  
12 and an ignition switch defect, but what additional discovery do  
13 they need in order to demonstrate that their defect was known  
14 or should have been known to Old GM, therefore leading  
15 presumably to the same conclusion that your due process rights  
16 were violated and that has an impact on whether or not the sale  
17 orders injunction is binding.

18 THE COURT: Is that an issue that Judge Furman is  
19 going to decide?

20 MR. WEISFELNER: I think Judge Furman's going to  
21 decide what, if any, discovery you're entitled to, and by  
22 implication, that may resolve the issue one way or the other  
23 from the perspective of those folks who may need to  
24 demonstrate, where Your Honor is so inclined, that their rights  
25 depend on whether or not there was a due process violation



1 relative to them. But there's a second part of the Second  
2 Circuit decision that I think is critical and is being  
3 overlooked or was overlooked, probably not intentionally, by  
4 Mr. Steinberg because he tends not to operate in that fashion,  
5 and that's what happens to independent claims.

6 I think what the Second Circuit said, and it couldn't  
7 have been clearer, is that regardless of what the bankruptcy  
8 court did or thought it was doing, there is no jurisdiction for  
9 a bankruptcy court to provide a get out of jail free card to a  
10 buyer in a 363 sale with regard to its own independent post-  
11 closing tortuous conduct or failure to act that gives rise to a  
12 claim. And as a consequence, everybody, the way we read it, be  
13 they first wave, second wave, or non-ISD, continues to have the  
14 right, always had the right notwithstanding what Judge Gerber  
15 may have written, to pursue independent claims against New GM,  
16 so long as it involves New GM's conduct and doesn't rely on  
17 conduct by Old GM that would have been part of retained  
18 liabilities, as that term is defined in the sale order.

19 So we'll brief it all, and the only issue we had  
20 between their articulation of what they call the Pillars issue  
21 and then the second issue that talked about the impact of prior  
22 decisions and whether people appealed them or not and therefore  
23 whether they have an entitlement to go forward, we thought  
24 those two issues should be merged. And in merging them, you  
25 could articulate the issue much more clearly. And again, I



1 think I --

2 THE COURT: I think -- maybe I'm misunderstanding. I  
3 think it would be helpful to me if those issues were separately  
4 identified as issues and the briefs treat them separate -- I  
5 mean, to the extent you think that it's decided by some other  
6 point in the argument. I just think it would be helpful to me  
7 to have the issues separately identified rather than folded  
8 together.

9 MR. WEISFELNER: And again, the only folding together  
10 we were doing is they articulated the Pillars decision as  
11 narrowly focused on what is an ignition switch defect  
12 plaintiff. They'll argue that an ignition switch defect  
13 plaintiff, by reference to the agreed-upon findings that we all  
14 stipulated to in advance of Judge Gerber determining the four  
15 threshold issues, was, in fact, limited to those cars that were  
16 in the first-wave recall. There was no debating that. That's  
17 what the stipulation says.

18 So I'm not sure why we need to brief that separate  
19 issue other than they want to then, it seems to me, expand that  
20 and say the second-wave ISDs are therefore properly defined as  
21 non-ISDs because they weren't in the first wave. I don't know  
22 why Your Honor needs briefing on that. Pick up the stipulated  
23 facts.

24 What flows from that is really contained in the  
25 second issue, which we've all agreed on, and that is has anyone



1 lost rights by virtue of their failure to appeal or -- in  
2 actuality, we all appealed. It's a question of what issues did  
3 we articulate on the appeal and to what extent did that failure  
4 to appeal, in effect, get excused because of a change in the  
5 law or -- it's kind of hard for me to stand here and tell you  
6 that what the Second Circuit did was change the law. I think  
7 they followed Travelers-Manville, so I'm not sure how that fits  
8 into a 60(d) context. I don't think they changed the law. I  
9 think they rearticulated it.

10 THE COURT: Well, they changed the law from what  
11 Judge Gerber ruled.

12 MR. WEISFELNER: They certainly changed the law as it  
13 was articulated by Judge Gerber. That's correct.

14 So, Your Honor, the only other points I would make,  
15 because this is a procedural matter, is Mr. Steinberg made  
16 reference to a lot of things that Judge Gerber said in  
17 anticipation of his retirement about bringing people together.

18 THE COURT: Easy for him to say when he was leaving.

19 MR. WEISFELNER: Well, easy for him to say because I  
20 was here and I didn't remember Judge Gerber suggesting that. I  
21 remember GM filing successive motions to enforce.

22 THE COURT: Let me ask you this. Do you -- are you  
23 in agreement with Mr. Steinberg about this order to show cause  
24 procedure to bring everybody here?

25 MR. WEISFELNER: Your Honor, I understand the





1 concerns that have been expressed by some of my plaintiff  
2 bankruptcy representative brethren. I hear it, I understand  
3 it. I think it's overwrought, quite frankly. I think the  
4 procedure can, should, and ultimately will be designed in such  
5 a fashion as to this is a case about due process to a very  
6 large extent. We're not going to make a due process mistake  
7 collectively, and I think an order to show cause is sufficient  
8 in that regard.

9 THE COURT: Okay.

10 MR. WEISFELNER: Unless Your Honor has any other  
11 questions.

12 THE COURT: We're separately going to talk about the  
13 late claim issue, but we'll get to that.

14 MR. WEISFELNER: Thank you.

15 THE COURT: Mr. Weintraub.

16 MR. WEINTRAUB: Thank you, Your Honor. William  
17 Weintraub for the ignition switch pre-closing accident  
18 plaintiff and certain post-closing non-ignition switch  
19 plaintiffs. I'm going to stifle -- I think I have successfully  
20 stifled any urge to respond to a lot of the argument that was  
21 made by Mr. Steinberg. That will be for another day, so I'll  
22 reserve right with respect to that.

23 The only point then that I want to make, in addition  
24 to also saying that I believe the order to show cause procedure  
25 is an appropriate procedure --



1 THE COURT: I mean, it does seem, to me, to work.  
2 When I read the objections that said adversary proceeding, that  
3 just is not right.

4 MR. WEINTRAUB: Right. We always thought that it  
5 works so long as people actually receive it.

6 THE COURT: Yes, as long as they receive notice.

7 MR. WEINTRAUB: And it is clear what is going to  
8 happen, which was --

9 THE COURT: Service under Rule 7004.

10 MR. WEINTRAUB: Exactly. As you may recall, our  
11 quibble with the September 2015 scheduling order -- not order  
12 to show cause, but scheduling order -- was it was far less than  
13 clear that people needed to appear or risk losing their rights.

14 The only point I'd like to make, Your Honor, is at  
15 page 16 of the status report, I raised two additional -- what I  
16 believe should be threshold issues that don't require  
17 discovery. I actually think that (2) is the independent claim  
18 argument that Mr. Weisfelner was just making. So -- and I  
19 think Your Honor was in agreement with that, so I don't think  
20 we -- any of us have an issue with (2) being an appropriate  
21 threshold issue. I also believe that (1), which also doesn't  
22 require discovery, is an appropriate threshold issue. Both of  
23 these issues relate to post-closing accidents, which we believe  
24 are in the nature of future claims. So then you have a very  
25 different due process issue than the one addressed by Judge



1 Gerber, which is a known or unknown creditor of Old GM.

2 THE COURT: Right.

3 MR. WEINTRAUB: These are not yet --

4 THE COURT: Judge Bernstein -- I can't -- what's the  
5 name of this case that he wrote?

6 MR. WEINTRAUB: Grumman Olson.

7 THE COURT: Yes, Grumman Olson, he got affirmed in  
8 the district court, just the future claim issue.

9 MR. WEINTRAUB: Exactly, Your Honor, and I think that  
10 would be ripe as a threshold issue, as well.

11 THE COURT: Okay. I may come to regret it, but it  
12 seems to me that for the purpose of what we're gearing up to  
13 do, certainly for this first round of briefing, to the extent  
14 the parties agree that no discovery is required, I think the  
15 issues should be included. I, you know, doubt -- disagree  
16 strongly about what the outcome ought to be and I don't think  
17 that you all should spend weeks word smithing exactly how it  
18 comes in. You ought to frame them neutrally, but the way that  
19 parties could understand what the issue is because ultimately,  
20 it's going to -- you know, you're all going to brief it, and  
21 I'm going to have to decide it.

22 The one thing I want to be careful about, I should  
23 have said this before, is -- and I've had a few conversations  
24 with Judge Furman. He and I haven't spoken in a while. I  
25 actually put in a call to him yesterday. I haven't heard back



1 from him yet. I want to be very careful not to consider or  
2 decide issues that he thinks properly belong before him. And  
3 to the extent that there does appear to be some overlap, I just  
4 want to be sure that he knows what issues are being raised  
5 here. And if he has questions about why them not being raised  
6 in -- you know, that they more appropriately should be raised  
7 before him, that's fine with me. But -- so, you know, Mr.  
8 Steinberg has certainly filed on this docket copies of the  
9 correspondence that go to Judge Furman, so I see some of that  
10 and I do look at it, but I want -- that's what I -- I just -- I  
11 want to be -- I got a little nervous when I read the status  
12 report, but when I see that some of these issues seem to be  
13 before Judge Furman, I don't want to get caught up in what  
14 should he decide, what should I decide.

15 MR. WEINTRAUB: And, Your Honor, that -- actually,  
16 your comment triggers something that I had written down earlier  
17 that I don't think we need to address today because Mr.  
18 Steinberg described it as a "maybe later" issue, and that's the  
19 successor liability issue. I think that --

20 THE COURT: That was what caught my attention when I  
21 saw that in there.

22 MR. WEINTRAUB: I think if this Court decides that  
23 the successor liability bar is not enforceable, the question of  
24 whether or not New GM is a successor should be something for  
25 the trial court to determine and not the bankruptcy court.



1 Unless you have any questions for me, Your Honor.

2 THE COURT: I think that's it for now.

3 MR. WEINTRAUB: Thank you, Your Honor.

4 THE COURT: Okay. Come on up.

5 MR. PELLER: Your Honor, Gary Peller for the Elliott,  
6 Bledsoe, and Sesay --

7 THE COURT: I keep reading your name in all the  
8 papers, but this is the first time I've actually set eyes on  
9 you, sir.

10 MR. PELLER: Nice to meet you, Your Honor.

11 We believe that the -- we disagree about the need for  
12 immediate discovery and believe that it's important to  
13 distinguish two procedural aspects of the parties before you.  
14 One part of the proceedings before you have to do with the  
15 remand from the court of appeals, and that remand contained a  
16 mandate. That mandate reversed -- affirmed part and reversed  
17 many parts of Judge Gerber's order, but only vacated and  
18 remanded for one issue, and that's whether the non-Delta  
19 ignition switch plaintiffs have a due process -- can make out a  
20 due process violation that would enable them to proceed with  
21 successor liability claims against New GM. We believe that  
22 that issue is -- should be the threshold issue for the remand  
23 part of these proceedings. It's specifically what the Second  
24 Circuit remanded for, and we believe that there's nothing to be  
25 gained by delaying discovery on that issue forthwith.



1 I believe that Mr. Steinberg might have mistaken when  
2 he said that Judge Furman is considering discovery on that due  
3 process issue in the MDL. I'm not -- I've followed the MDL  
4 proceedings quite closely, and I'm not aware of Judge Gerber  
5 approving discovery on due process issue.

6 THE COURT: Judge Furman.

7 MR. PELLER: I'm sorry, Judge Furman approving  
8 discovery on a judge -- on a due process issue.

9 Another aspect is that even -- there's no point, as  
10 we see it, in awaiting Judge Furman's successor liability  
11 rulings. Those successor liability rulings will only apply to  
12 the parties of the fourth amended consolidated complaint, which  
13 includes a subset of the MDL plaintiffs, but of course, doesn't  
14 include any of the state plaintiffs and the various --

15 THE COURT: Well, you know, I have found many of  
16 Judge Furman's decisions, not only in Motors Liquidation, but  
17 in other cases, quite persuasive. So whether one of his  
18 decisions is binding, it may well be persuasive. And if and to  
19 the extent the issues are before me, I might -- you know, I  
20 might well be inclined to follow him. So the briefing is  
21 underway before Judge Furman on the successor liability issue.  
22 No briefing has occurred here yet.

23 MR. PELLER: With due respect, Your Honor, the --  
24 those issue will never be before you. The question of whether  
25 plaintiffs make out a successor liability claim against New GM



1 is always going to be for a trial court hearing the claims, not  
2 for the bankruptcy court. The issue before you is whether non-  
3 Delta ignition switch plaintiffs --

4 THE COURT: Well, I thought that the circuit said --  
5 I don't have it -- didn't pull the opinion out with me today,  
6 but I thought that Judge Chin made the point that -- which I  
7 felt was the trend in authority, but not fully resolved in the  
8 Second Circuit -- that a bar on successor liability claims is  
9 proper -- can be proper. The question was here whether  
10 violation of due process prevented it from being enforceable,  
11 but that a plan or a sale order may include a prohibition on  
12 claims of successor liability. Do you disagree with that?

13 MR. PELLER: No, I don't, Your Honor. I may have  
14 misunderstood your earlier comment. I thought that you were  
15 saying that you would be asked to rule on the very same issue  
16 that Judge Furman's about to rule on.

17 THE COURT: No, I was concerned. I saw the reference  
18 in the status report to Judge Furman -- briefing going on  
19 before Judge Furman on successor liability and the suggestion  
20 that there were going to be issues before me, and that was what  
21 I was concerned about because I saw -- I don't want to be in  
22 the position of dealing with issues that are pending before  
23 Judge Furman.

24 MR. PELLER: Our only point, Your Honor, is that the  
25 question of whether successor liability can be asserted under



1 state law will not determine the question that is before you  
2 that's remanded by the Second Circuit mandate, and that is  
3 whether non-Delta ignition switch plaintiffs can make out a due  
4 process violation to assert any claims --

5 THE COURT: What's the discovery you want to  
6 undertake, Mr. Peller?

7 MR. PELLER: GM's -- Old GM's knowledge of and -- or  
8 questions of whether Old GM should have known, the same  
9 questions that Second Circuit ruled on with respect to the  
10 Delta ignition switch with respect to non-Delta ignition switch  
11 plaintiffs. So for example, we assert a power steering defect,  
12 and we alleged, you know, many, many paragraphs in our  
13 complaint that show that Old GM knew and that when New GM came  
14 into existence, it also knew of these defects. So we would be  
15 arguing that, for example, with respect to the non-Delta  
16 ignition switch power steering defects, those plaintiffs also  
17 ought to be able to assert successor liability claims against  
18 New GM because they also were victims of a due process  
19 violation with respect to the lead up to the sale order.

20 Your Honor, if I could now move to the order to show  
21 cause questions. And I've listened carefully to Your Honor's  
22 exchange with counsel before me.

23 This is what I see the problem with that procedure.  
24 There is a certain number of plaintiffs -- of parties who are  
25 here before Judge Gerber litigating the four threshold issues.





1 Those parties aren't a secret. They didn't include categorical  
2 all ignition switch, all pre-accident [sic] accident  
3 plaintiffs. They included particular parties who were  
4 represented by designated counsel through the co-lead counsel.  
5 Those are particular parties that the co-lead counsel  
6 represents. The co-lead counsel do not, for those purposes,  
7 represent all parties in the MDL, but more importantly, those  
8 parties are just listed on the Judge judgment. They're --

9 THE COURT: May I ask you this, Mr. Peller? Do you  
10 agree that the Court can consider a contested matter in which  
11 all parties are properly served that addresses the issue of  
12 whether the injunction in the sale order is enforceable against  
13 them?

14 MR. PELLER: Your Honor, I believe that the  
15 procedurally appropriate thing is GM did for all the parties --

16 THE COURT: Could you answer my question?

17 MR. PELLER: Yes, but I think procedurally  
18 appropriate is the initiation of --

19 THE COURT: Mr. Peller?

20 MR. PELLER: Yes, sir?

21 THE COURT: Let's deal first with my question, and  
22 then I'll let you expand.

23 MR. PELLER: Yeah. Yes, Your Honor.

24 THE COURT: You agree that an order to show cause  
25 properly served on all parties that New GM seeks to bind is a



1 proper procedure to raise the issue in this court, bind under  
2 the injunction in the sale order?

3 MR. PELLER: No, I do not, Your Honor.

4 THE COURT: Why not?

5 MR. PELLER: Judge Gerber did rule, and it was not  
6 appealed on the --

7 THE COURT: I don't want to know about Judge Gerber.  
8 I'm --

9 MR. PELLER: Okay. Your Honor --

10 THE COURT: I may have the issue of whether Judge  
11 Gerber's rulings -- to what extent are those enforceable  
12 against, but even if I concluded they weren't, I may be able to  
13 decide as a fresh proposition. I may find Judge Gerber's  
14 rulings to be persuasive. It's the point I make about Judge  
15 Furman. His decisions may not be binding on parties in matters  
16 before me, but I may find them persuasive. I may find Judge  
17 Gerber's decisions persuasive. So if -- to the extent that  
18 parties are given -- and I know this is disputed because Mr.  
19 Steinberg says they were given proper notice, and I'm going to  
20 have to decide that, but even if I assume that they weren't, if  
21 they're properly served now, an order to show cause is a proper  
22 method of raising the issues before me whether those parties  
23 are bound by the injunction in the sale order. Do you agree  
24 with that?

25 MR. PELLER: I don't, Your Honor. I believe --



1 THE COURT: Okay. Tell me why.

2 MR. PELLER: I believe that the appropriate procedure  
3 -- we believe the appropriate procedure, because they're asking  
4 for injunction, was the initiation of an adversary proceeding  
5 --

6 THE COURT: What about 7001(7), which specifically  
7 seems to permit the procedure? It's typically by motion, and  
8 order to show cause is the same effect as a motion. How do you  
9 distinguish what 7001(7) provides?

10 MR. PELLER: Because an order to show cause puts the  
11 onus on the served party to come in and to prove, as if it were  
12 presumed and the default was that they were --

13 THE COURT: Oh, no. New GM may have the onus of  
14 proving, so an order to show cause doesn't set the burdens. It  
15 just says who's got to come before me. And what I anticipate  
16 is that a briefing schedule will have New GM going first and  
17 parties having an opportunity to file objections and then New  
18 GM filing a reply. I'm not going to dictate. I'm going to  
19 leave it to counsel to try and work out an omnibus briefing  
20 schedule, but you seem to be confusing -- an order to show  
21 cause doesn't determine who has the burden. It sets forth --  
22 it brings before the Court a -- in this case, what I believe --  
23 what is obviously a contested matter, and there will be a  
24 scheduling order prepared. It would include briefing, which I  
25 expect counsel to work cooperatively, and I assume they will,



1 as to what the schedule is, but you haven't convinced me why  
2 7001(7) doesn't -- the exception in that doesn't apply so that  
3 it does not have to be by adversary proceeding.

4 MR. PELLER: I don't -- I understand that it can be  
5 by a contested matter, Your Honor, but I believe --

6 THE COURT: And a contested matter can be triggered  
7 by an order to show cause.

8 MR. PELLER: We believe that --

9 THE COURT: You disagree with -- do you have any  
10 authority that says that a contested matter can't be triggered  
11 by an order to show cause?

12 MR. PELLER: No, I don't, Your Honor. The -- we  
13 believe that the appropriate procedure is the one that New GM  
14 filed -- that was filed in the past, and that is to file a  
15 motion to enforce that carries as a motion all the procedural  
16 rights that are guaranteed under the Federal Rules of  
17 Bankruptcy.

18 THE COURT: I hear you. I disagree with you.

19 MR. PELLER: Okay.

20 THE COURT: Okay.

21 MR. PELLER: And I accept that, Your Honor. So in  
22 sum, Your Honor, we believe that the other problem with the  
23 order to show cause procedure is that by that procedure, New GM  
24 is just going to sweep in everyone who's filed kind of  
25 complaints against New GM.



1 THE COURT: They are.

2 MR. PELLER: Yes, exactly. And that is improper  
3 given that the remand proceedings that involved the parties who  
4 litigated the four threshold --

5 THE COURT: I have --

6 MR. PELLER: -- issues didn't involve all these other  
7 parties out in the universe.

8 THE COURT: Mr. Peller, Motors Liquidation is pending  
9 before me. Judge Gerber retired, the case got transferred to  
10 me. Whether it's strictly within the four corners of the  
11 remand or whether it's a matter that's properly raised in the  
12 pending matter before me in the Motors Liquidation, you know,  
13 but I only want to decide these questions once, to the extent  
14 that that's possible. I want to give everybody a fair chance  
15 to argue their positions, and it may be that not everything  
16 that gets briefed to where the parties think can be resolved  
17 without discovery, maybe it can't. I don't know. All right.  
18 I'm not deciding any of that now.

19 But there -- I understand your objections. There  
20 seems to be a fairly substantial broad agreement that there are  
21 a group of threshold issues that can properly be brought before  
22 the Court using this OFC procedure. I agree the procedure is a  
23 correct one. All right. What the outcome of those issues, I  
24 don't know.

25 MR. PELLER: Of course, Your Honor, and I'll conclude



1 with this. We also disagree with the identification of the  
2 threshold issues in that we believe that the pressing threshold  
3 issue is that identified by the court of appeals mandate in  
4 that --

5 THE COURT: You don't agree with the issues they did  
6 identify. You think that the one and only threshold issue  
7 should be due process with respect to non-ignition switch  
8 parties?

9 MR. PELLER: Well, Your Honor, the question is how  
10 much GM is going to be allowed to simply relitigate the court  
11 of appeals decision over and over and over again. They've got  
12 listed one of the issues as whether used car purchasers are  
13 precluded from suing under the sale order. The Second Circuit  
14 clearly ruled on that. They have another issue of independent  
15 claims, and I think that -- I think that this Court should --

16 THE COURT: If you're right, Mr. Peller, it's going  
17 to be a very short piece of an opinion, okay.

18 MR. PELLER: Okay. Thank you, Your Honor.

19 THE COURT: But what I want to do is I want to get  
20 before me, if possible at a single proceeding, all of the  
21 relevant parties, and I think the relevant parties are well  
22 beyond what you think are the relevant parties, and I want  
23 briefing and I want, from the plaintiffs' side, I don't want 47  
24 briefs. I want -- you know, Judge Bernstein, in Madoff, has  
25 entered some orders for an omnibus briefing. I've usually not

1 had a problem with this when I've had cases with lots of  
2 parties, so that there's one main brief, and if people have  
3 some specific issues they think are relating only to them, they  
4 can file short briefs, but I don't expect to get a separate  
5 brief from everybody who's conceivably involved. I want to  
6 allow enough time in the briefing schedule, from the  
7 plaintiffs' standpoint, that they can try and get some  
8 coordination so that people will sign on to one main brief, and  
9 if there are some small briefs that deal with issues, fine.  
10 But I'm not going to permit everybody who conceivably is  
11 involved to be filing separate briefs on all the same issues.  
12 I'm not going to read them all.

13 MR. PELLER: Your Honor, you may be aware that the  
14 plaintiffs' group has had quite a bit of conflict over what  
15 issues to present, what legal theories to present, and so I  
16 hope we can convince you, if need be, that at least we should  
17 be permitted to file independent papers from designated  
18 counsel.

19 THE COURT: Well, you're not going to convince me,  
20 all right. To the extent there are common issues that are  
21 going to be addressed, I don't -- you know, your paper is not  
22 going to get read if that's -- if you're filing on the same  
23 issues as everybody else. So there ought to be enough time  
24 built into the schedule that whether it's Mr. Weisfelner or Mr.  
25 Weintraub, whoever's going to -- what group is going to take



1 the lead, but they can circulate the draft, they can get  
2 comments and try -- and if you've got separate issues that are  
3 not in the common issues, that are identified as issues for  
4 this first phase, fine. They're going to be -- they're not  
5 going to be 50-page briefs on those, all right.

6 All right. Let me hear, any other counsel want to be  
7 heard?

8 MR. PELLER: Thank you, Your Honor.

9 THE COURT: Anybody on the phone wish to be heard?

10 MR. BABCOCK: Your Honor, Russell Babcock on behalf  
11 of Benjamin Pillars. I mean, obviously, you know, there's --  
12 the segment which appeared on page 9 of the statement kind of  
13 identifies New GM's take on what Judge Furman did. Obviously,  
14 I guess -- the only thing I guess I would add is there is  
15 considerable disagreement about a lot of things, but one thing  
16 Judge Furman was pointing out, at least with regards to the  
17 Pillars issue, was that obviously depending on how the ultimate  
18 outcome of the -- whether or not there is an application filed  
19 with the Supreme Court and how that is resolved one way or the  
20 other may shape the issue that pertained to my particular  
21 client. He identified three different scenarios at least that  
22 he envisions.

23 I don't know how Your Honor wishes to proceed with  
24 those issues. Obviously, I think Judge Furman envisioning this  
25 being an issue that would addressed once the dust has settled





1 on the appellate process on that issue. So that's kind of  
2 where we're at. Obviously, Judge issued his ruling -- Judge  
3 Furman did, at least, and that's kind of where we're at.

4 THE COURT: Thank you, Mr. Babcock.

5 Anybody else on the phone?

6 MR. LEDFORD: Your Honor, this is Kris Ledford on  
7 behalf of the Pope plaintiffs. I've set out, and I've tried to  
8 be concise, my position on some of these issues, but I'm only  
9 speaking up now, Judge, because of what you just expressed,  
10 that you don't want a bunch of briefs.

11 Your Honor, some of these issues, while they may  
12 appear common, they -- the argument for my clients is different  
13 than it is for the economic loss, especially when we get into  
14 discussing how we're going to define terms. And I set that  
15 out. I won't make the argument now, but I set it out for you  
16 how there was a specific definition of non-ignition switch  
17 plaintiffs that now New GM wants to make my clients part of and  
18 therefore be bound by these prior orders when we were never  
19 part of that definition that was used by the Court. And so I  
20 would respectfully ask that when we -- while you may set out a  
21 procedure that says there's going to be one lead brief that  
22 please allow us, as easily as possible, especially those of us  
23 that are not up there, that don't practice before you, allow us  
24 to file some sort of supplement or some sort of paper to  
25 protect our clients' interest and how we get treated.



1 THE COURT: Mr. Ledford, as I said, to the extent  
2 that you believe there are -- take that, for example, the issue  
3 you identified. You believe it's an individual issue as to  
4 your client, may apply to others, as well. I'm not precluding  
5 a brief on that issue. I don't -- you know, so let me make  
6 clear. I impose page limits on briefs. I'm not going to set  
7 the page limit today. All right. I think that the, you know,  
8 New GM and the -- certainly, the co-lead counsel for the  
9 plaintiffs -- and I hope I'm not insulting anybody with that  
10 label, okay -- will confer about an appropriate page limit. I  
11 would -- you know, there are a lot of issues. My normal 25-  
12 page rule is not going to apply, but I don't want -- I really  
13 would prefer to avoid 100-page briefs, okay. But I want  
14 counsel to confer about it.

15 On the point that Mr. Ledford raises, in cases where  
16 I have had separate briefs because there are parties that  
17 believe there are separate issues, I've more typically imposed  
18 a 10 or 15-page limit on those briefs. Shorter is better than  
19 longer, okay. I do read everything that comes before me, but  
20 I'm not trying to preclude any party from making an argument.  
21 If you believe you have a unique argument, I'll permit it, but  
22 I'm not going to permit a 30-page brief on some, you know,  
23 narrow issue that you think applies to yours. There's a lot --  
24 your client -- there's a lot of issues.

25 All right. Let me -- anybody else wish to be heard



1 on the phone?

2 MR. LEDFORD: Your Honor, I -- this is Kris Ledford  
3 again -- I have one other issue that is listed on page 15. And  
4 it's the other party's position. It's the Pope plaintiff item  
5 number 1. And I didn't get to express how that was stated. I  
6 just want to raise it with you. Here's what that's all about,  
7 Your Honor. And I don't know if you want -- I'd like for this  
8 to get resolved sooner rather than later, but when I received a  
9 letter from New GM's counsel in May of this year that said, you  
10 are violating the bankruptcy stay -- or the injunction, I took  
11 it to heart. I then got a motion filed against me in June, and  
12 I stopped discovery. I was ready to file a motion to compel on  
13 a bunch of important issues, but I didn't file it because I was  
14 threatened with all kinds of things if I proceeded.

15 Notwithstanding the fact that I stopped in the state  
16 court, New GM, in the state court action, has taken additional  
17 discovery. They've taken depositions. And I feel like it's  
18 unfair. I'm not close to trial, Judge. I'm trying to get some  
19 basic discovery done, and I'm going to have to file a motion to  
20 compel to get it done. And all I'm trying to do is get  
21 permission to go forward on that and not be faced with the, oh,  
22 there's the bankruptcy proceeding, therefore you can't do it.  
23 That's what I'm trying to avoid. I need to get my case moving  
24 in the state court and not wait another year before I file a  
25 motion to compel on some basic written discovery.



1 THE COURT: What court is your action pending  
2 innocent?

3 MR. LEDFORD: It's in Oklahoma in Muskogee County.

4 THE COURT: Okay. I'm going to ask Mr. Steinberg  
5 about it. I take your point to heart, and I'm not ignoring it.  
6 We'll -- any other points you want to make, Mr. Ledford?

7 MR. LEDFORD: No, sir.

8 THE COURT: All right. Anybody else on the phone  
9 wish to be heard?

10 All right. Mr. Steinberg, and then Mr. Weisfelner.  
11 Address this discovery issue because I'm reading on page 15,  
12 and you say Pope plaintiffs are free to pursue any discovery  
13 they choose in the trial court.

14 MR. STEINBERG: Right. We were trying to deal with  
15 this issue in connection with the status report so we would  
16 have one less paragraph in the status report. New GM's  
17 position is if he wants to take discovery -- because he's a  
18 post-sale accident, so part of it, as an assumed liabilities,  
19 always been entitled to take that type of discovery. The issue  
20 is, is that he's a non-ignition switch post-sale accident, and  
21 he's asking for punitive damages. So the -- to the extent that  
22 some of the discovery that he wants to take is not related to  
23 the accident, but is related to the type or the ability to pay  
24 because of punitive damages, we were saying that he shouldn't  
25 be able to go forward.



1 Our position that we set forth in the status report,  
2 not to burden Your Honor with all the issues that we otherwise  
3 have, is that he could argue whatever he wants in his state  
4 court action before the Oklahoma judge, and we reserve our  
5 right to tell the Oklahoma judge that he's pursuing punitive  
6 damages in -- if the discovery that he wants is tailored to  
7 just the punitive damage aspect, we reserve the right to tell  
8 the Oklahoma judge that that's a violation of Judge Gerber's  
9 December judgment, and then the Oklahoma judge will decide,  
10 based on our presentation, whether that's correct or not.

11 So we were prepared to take this entire issue away  
12 from Your Honor, but argue that --

13 THE COURT: So you would -- let me just cut through  
14 this. You agree that New GM will -- is prepared to address the  
15 issue before the state court judge in Oklahoma about the scope  
16 of permissible discovery in the Pope action.

17 MR. STEINBERG: That's correct.

18 THE COURT: All right. Are you satisfied that with  
19 [sic], Mr. Ledford?

20 MR. LEDFORD: Well, what I'm trying to get is them to  
21 make -- they can make the argument that it's premature because  
22 of the Second Circuit ruling.

23 THE COURT: No. Mr. Ledford, you want your judge to  
24 be able to decide the issues. As Mr. Steinberg said, he's  
25 going to leave it to your judge to decide the issues.



1 MR. LEDFORD: Okay. That -- I had asked directly  
2 whether or not they're going to argue premature versus  
3 forbidden, and they wouldn't answer that. What I heard him say  
4 is --

5 THE COURT: You ask in Oklahoma, not before me, Mr.  
6 --

7 MR. LEDFORD: -- they're just going to argue  
8 premature.

9 THE COURT: I'm not going to -- okay. On the issue  
10 of what's the permissible scope of discovery in your action in  
11 Oklahoma, it's out of my hands. It'll be dealt with with the  
12 judge in Oklahoma. Is that right, Mr. Steinberg?

13 MR. STEINBERG: That is correct, but we're going to  
14 argue what happened in the bankruptcy court.

15 THE COURT: Yes, but you're going to argue it before  
16 the judge --

17 MR. STEINBERG: In Oklahoma.

18 THE COURT: -- in Oklahoma.

19 MR. STEINBERG: That's correct. He'll set what he  
20 wants to.

21 THE COURT: Okay. All right. So -- all right.  
22 Anybody else on the phone wish to be heard? No.

23 Go ahead, Mr. Steinberg. Let's do --

24 MR. STEINBERG: All right. Your Honor has given us a  
25 lot of time, and I don't really want to spend a lot more time



1 because I guess Your Honor will give us guidance at the end as  
2 to how you want us to proceed. I just want to highlight a  
3 couple of things that were said, just so it's clear. The  
4 reason why -- and I think Your Honor had said that you wanted  
5 to see what I labeled the first issue, the Pillars issue, as a  
6 separate issue. It's because there actually was a back and  
7 forth with Judge Furman.

8 I'm not sure whether you -- whether we actually have  
9 given it to you, but we actually went through a briefing  
10 schedule, letter briefs that were submitted by the Pillars'  
11 counsel and by New GM in the MDL as to whether the Second  
12 Circuit opinion impacted this appear because they were an  
13 ignition switch or a non-ignition switch plaintiff. So --

14 THE COURT: This is on page 9 of the --

15 MR. STEINBERG: That's right. Judge Furman said,  
16 either you're going to win because you convinced the Second  
17 Circuit to reconsider, or if it gets down to the bankruptcy  
18 court, I want to hear from Judge Glenn on that issue. So  
19 that's why that's a separate issue. It's --

20 THE COURT: I'd rather hear from Judge Furman on it,  
21 but I don't know.

22 MR. STEINBERG: But that's the reason why it's  
23 separate, and we think it should be separately briefed.

24 THE COURT: The issue, okay -- look, we still have to  
25 deal with the late claim. I'm going to deal with that in a few



1 minutes, but with respect -- what I want you to do is sit down  
2 and provide me with a single list --

3 MR. STEINBERG: I can do that.

4 THE COURT: -- of the threshold issues. And, you  
5 know, I think you're all -- you all have a different agenda for  
6 today, okay. Stop word smithing it to this point. Yeah, the  
7 issues have to be fairly identified, but we're going to go  
8 forward with -- and then negotiate proposed briefing schedule.  
9 As I said, I think on the plaintiffs' side, because I don't  
10 want separate briefs from everybody who's going to get served,  
11 you need to build in enough time that they can circulate. The  
12 lead counsel who are going to -- I assume are going to take the  
13 lead in putting the brief together can circulate it and  
14 hopefully get comments. That's a more time-consuming process  
15 than you have on your side. So take that into account when you  
16 work out the schedule.

17 MR. STEINBERG: Your Honor, to the extent that the  
18 threshold issues have been numbered, I'm pretty sure that we'll  
19 get to closure on identifying how the issues should be spelled  
20 out in the order to show cause for one, two, and three. The  
21 fourth one --

22 THE COURT: What page?

23 MR. STEINBERG: One, two -- I'm on pages -- starting  
24 on page 9 through 14. I think we can fairly well, in talking  
25 to designated counsel, work with the language we have and the





1 language that they've included in the report and in the  
2 appendix to get to that. I'm pretty sure we can get there.  
3 Item four, we'll need some guidance on how you want to approach  
4 the --

5 THE COURT: We're going to do that now.

6 MR. STEINBERG: -- the late proof of claim.

7 THE COURT: Yes.

8 MR. STEINBERG: The issue that Goodwin Proctor  
9 identified on page 16 as two additional threshold issues, I  
10 think that --

11 THE COURT: Include them.

12 MR. STEINBERG: I think we can include them --

13 THE COURT: Include them.

14 MR. STEINBERG: Okay.

15 THE COURT: My view is if they -- I have no doubt  
16 that Mr. Weintraub believes that these are threshold issues.  
17 You may disagree. You'll brief them.

18 MR. STEINBERG: Okay. The only thing that I would  
19 say on those issues, because I wasn't going to quarrel about  
20 briefing them, is that sometimes these two issues, the devil is  
21 in the detail of what they're talking about. And there, it  
22 would almost be better to have a test case that illustrates  
23 these two points so that we can then brief the issue with  
24 regard to a test case. Because inherent in these questions is  
25 what is actually an independent claim and whether they're



1 really asserting something that's independent in the context of  
2 what Judge Gerber said.

3 THE COURT: Well, sit down with Mr. Weintraub and see  
4 if you can work out the agreement. Otherwise, it's going to --  
5 we're going to include these issues.

6 MR. STEINBERG: Okay. Then I think -- then other  
7 than that, the only other thing that I would just point out  
8 just to -- so Your Honor had it, and I don't have it exactly to  
9 the WestLaw cite, but in the Second Circuit opinion on this  
10 issue that you've been talking about with Mr. Peller about  
11 whether you can do this by order to show cause, there is a  
12 specific reference. The Court ruled on that.

13 THE COURT: I'm satisfied I can do it by order to  
14 show cause.

15 MR. STEINBERG: And finally, just the final comment  
16 I'll have is I think Mr. Peller attributed some comment to me  
17 that was really something that Mr. Weisfelner said. You should  
18 -- Your Honor should understand that there is ongoing discovery  
19 right now in the MDL on second wave discovery. I mean, that is  
20 happening.

21 THE COURT: I addressed Mr. Peller's point, that he  
22 believes the non-ignition switch plaintiffs are entitled to  
23 discovery on the due process issue, which is not resolved by  
24 the circuit, which is remanded here. Why shouldn't that  
25 discovery go forward?



1 MR. STEINBERG: The issue that he's referring to here  
2 -- he's -- I think he's talking about economic loss cases, and  
3 there, we say that if Judge Furman rules on successful  
4 liability in favor of either side, that will help decide  
5 whether you need to take discovery at all. Also, the issue of  
6 discovery on ignition/non-ignition switch cases, whether you  
7 use my nomenclature or Mr. Weisfelner's nomenclature, is  
8 something that has been orchestrated and talked about in the  
9 MDL before Judge Furman with lead counsel.

10 What you have here is Mr. Peller, who is in -- who's  
11 got 14 clients, who's not part of the executive counsel, who's  
12 trying to use this court and this process to try to get  
13 discovery when Judge Furman has tried to organize the discovery  
14 around that situation.

15 THE COURT: All right. Okay. Now, let's talk about  
16 the --

17 MR. WEISFELNER: Can I just comment very --

18 THE COURT: Go ahead, Mr. Weisfelner.

19 MR. WEISFELNER: -- briefly before we do that? And  
20 Arthur was correct. Mr. Peller made reference to Mr. Steinberg  
21 when I think he meant to make reference to me.

22 Here are the facts as best as I know them. There is  
23 discovery that's ongoing in the MDL between New GM and lead  
24 counsel. It does involve, to a very large extent, the second  
25 wave ISDs and whether those defects were known at a point in



1 time. There will -- there has been and will no doubt continue  
2 to be disputes between New GM and lead counsel as to the scope  
3 of that discovery, how much more of that discovery is going to  
4 be allowed, all of which is before Judge Furman.

5 THE COURT: And I'm going to leave it before Judge  
6 Furman.

7 MR. WEISFELNER: And, Your Honor, just to sort of  
8 frame the issue as to why discovery in this Court is, from our  
9 perspective, terribly premature, start with the proposition  
10 that the Second Circuit said for certain plaintiffs, and maybe  
11 said it for everybody in the world, but the sale order is non-  
12 effective because of a violation of due process. Well, that's  
13 a victory.

14 Now, what does one do with that victory? If the sale  
15 order is not binding, then presumably you can sue New GM on  
16 account of Old GM's actions and conduct. Well, under what  
17 theory would you do that? The one that comes to mind, and I  
18 have a very narrow mind, is successor liability. Well, if  
19 Judge Furman decides in the context of the pending proposed  
20 class action that successor liability is not available in the  
21 16 states that are pending, it may very well be that from the  
22 perspective of lead counsel in the MDL, we say, well, then, who  
23 cares whether or not there's a due process violation for  
24 anybody whose due process violation hasn't been determined  
25 because even if we win, it's a pyrrhic victory.



1 THE COURT: Believe it or not, Mr. Steinberg  
2 convinced me that -- not to, at this stage, to have discovery  
3 on the due process issue.

4 MR. WEISFELNER: Okay. The only other point that I  
5 want to make, Your Honor, is one loves a challenge, even to the  
6 point of having to hurt cats. We have attempted in the past,  
7 on multiple occasions, to work with Mr. Peller. Sometimes  
8 we're successful.

9 THE COURT: I think you can leave this part out,  
10 okay, but stay up there, Mr. Weisfelner because I want to talk  
11 about the late proof of claim.

12 MR. WEISFELNER: Yes, sir.

13 THE COURT: And this is on page 14 of the status  
14 report. I've been surprised that you haven't filed -- you told  
15 me a long time ago that you were going to file a motion for  
16 leave to file a late proof of claim and you haven't yet. I  
17 wasn't enamored of what was suggested in the status report. It  
18 seems to me, file your motion for late proof of claim, let them  
19 oppose it. I mean, I thought that -- maybe I have to clearly  
20 go back and read the second circuit opinion, but I thought they  
21 reversed Judge Gerber on equitable mootness. They specifically  
22 talked about the accordion feature of the plan. At this stage,  
23 what's the amount of the allowed claims in the Old GM  
24 bankruptcy?

25 MR. WEISFELNER: Approximately -- someone will



1 correct me, I'm sure, if I'm wrong -- about \$32 billion worth  
2 of allowed claims.

3 THE COURT: So close to the 35 billion threshold for  
4 triggering the accordion?

5 MR. WEISFELNER: Give or take, \$3 billion. That's  
6 correct.

7 THE COURT: That's real money to me, but you know,  
8 okay. So why don't you --

9 MR. WEISFELNER: Here's the issue.

10 THE COURT: Okay.

11 MR. WEISFELNER: We'd be prepared to file a motion  
12 for authority to file a late proof of claim virtually whenever  
13 Your Honor directed us. Here are the open issues. On whose  
14 behalf should the motion be filed? And we've got a choice of  
15 three potential groups, first wave, second wave, non-ISDs.

16 Second issue is class issues. You heard Mr.  
17 Steinberg tell you that certification in the MDL is a '20, '17,  
18 '18, or '19 issue. If the parties would concede that for  
19 purposes of determining whether or not we're entitled to file a  
20 late proof of claim, we'd be permitted to pursue them as class  
21 claims consistent with the positions we've taken before Judge  
22 Furman in the MDL, then that issue is gone. We'll file our  
23 motion, and people can have at it. But it was not to get  
24 caught up in our own collective underwear by filing a motion  
25 and then arguing over who it is that we purport to represent



1 for purposes of that motion when class certification hasn't  
2 happened yet.

3 THE COURT: Right. And that's not likely to happen  
4 until when?

5 MR. WEISFELNER: 2018 is our collective best guess.

6 THE COURT: I don't want to wait that long.

7 MR. WEISFELNER: Neither do we. Here's my  
8 suggestion.

9 THE COURT: Let me just -- so I think I've only had  
10 one case where -- with the class proof of claim issue. It was  
11 a WARN Act claim -- or actually, it was the medical because  
12 WARN Act is equitable. Okay. And there was going to be --  
13 there was, you know, there was -- a claim had been filed, and  
14 it was filed on behalf of named individuals and as  
15 representatives of whoever. The issue of certifying a class  
16 was a different issue, and they ultimately stipulated to it,  
17 and fortunately it all got settled, but maybe I don't -- and  
18 maybe Mr. Steinberg will tell me what the issues are that he's  
19 going to raise in opposition to a motion to file --

20 MR. WEISFELNER: I'm not sure our opposition  
21 primarily comes from New GM on this score. And what I was  
22 going to suggest is our concern really emanates from  
23 discussions we've had with counsel to the GUC Trust, Gibson  
24 Dunn, and counsel for the GUC unitholders, Ms. Newman's group.  
25 I'm happy to work with them to see if we can't stipulate that



1 solely for purposes of getting to the next step, i.e. us filing  
2 a motion for authority to file late claims, that without  
3 prejudice to their position on class certification now or any  
4 time in the future, that issue will not be raised in opposition  
5 to the motion, then I think we can and should get on with the  
6 late proof of claim issue.

7 THE COURT: Okay. I don't -- I'm not going to wait  
8 until 2018, 2017, 2018 to deal with this issue. And the way it  
9 was described in the status report seemed -- it's -- you know,  
10 Mr. Peller talked about the -- part of the issue on remand.  
11 Well, they reversed Judge Gerber on equitable mootness. It's  
12 back, and let's get on with it.

13 MR. STEINBERG: Except, Your Honor, I don't think the  
14 Second Circuit reversed Judge Gerber on equitable mootness on  
15 the merits. It said there was not a case or controversy  
16 because they had no motion for the filing of a late-filed  
17 claim. So that's why you see in the status report that if a  
18 late file motion is filed, that will be the case or controversy  
19 which triggers the Judge Gerber ruling on the substance of  
20 equitable mootness.

21 THE COURT: Well, look, I mean, I didn't bring out  
22 Judge Gerber's ruling, but equitable mootness, he found, hey,  
23 this is substantially consummated. There is -- there's nothing  
24 else. Well, the Second Circuit said accordion feature.

25 MR. STEINBERG: No.





1 THE COURT: They do talk about it.

2 MR. STEINBERG: They do.

3 THE COURT: Judge Chin talks about the accordion  
4 feature.

5 MR. STEINBERG: They do.

6 THE COURT: And that was why my question to Mr.  
7 Weisfelner, what's the allowed amounts of claims now? Thirty-  
8 five billion triggers the accordion.

9 MR. STEINBERG: Yes and no. Okay.

10 THE COURT: Tell me why not.

11 MR. STEINBERG: Thirty-five billion is correctly the  
12 threshold number, but -- and you'll see this is one of the  
13 deferred issues. It's --

14 THE COURT: We're not going to defer it.

15 MR. STEINBERG: No, no. I was describing where it is  
16 in the status report. I'm about to tell you.

17 THE COURT: I know it is, and that's -- and I'm  
18 telling you we're not going to defer it.

19 MR. STEINBERG: No, no. I understand. Okay. So  
20 please trike the word "deferred." Let me just explain to you  
21 why I equivocated on the 35 billion.

22 Thirty-five billion is GM's position. It's the  
23 second phase of the purchase price. It was -- they paid a  
24 credit bid, some cash, some stock, and then if the claims pool  
25 had exceeded a certain amount, it was additional consideration



1 stocks and --

2 THE COURT: Stocks.

3 MR. STEINBERG: -- wants stocks to be provided. That  
4 was conditioned upon New GM, as the purchaser, getting the  
5 benefit of the bargain that it contracted for.

6 THE COURT: Well, I understand you've got your  
7 arguments about benefit of the bargain. Good luck.

8 MR. STEINBERG: And therefore, there's an issue.  
9 Well, I mean, there's an issue as to whether --

10 THE COURT: Okay. We'll deal with that issue.

11 MR. STEINBERG: Right. Okay.

12 THE COURT: But we're going to move on and brief --  
13 and it seemed to me that the best way to do that --

14 I think, Mr. Weisfelner, you should try to agree with  
15 the GUC Trust because I'm not -- in deciding whether to allow  
16 the late claim, I'm not going to decide the class certification  
17 issue at this stage. That's going to get deferred, all right.  
18 But I think we ought to see whether the late claims can be  
19 filed -- will be permitted, and I'll -- that seems to me to be  
20 a threshold issue.

21 MR. STEINBERG: I agree. I agree. That's -- it is  
22 listed as a threshold issue.

23 THE COURT: Well --

24 MR. WEISFELNER: It's listed, but here's the problem.

25 MR. STEINBERG: Yeah, let me just say that --



1 THE COURT: The procedure you proposed is not  
2 acceptable.

3 MR. WEISFELNER: You sort of get there, right? You  
4 know, the --

5 THE COURT: I do.

6 MR. WEISFELNER: The proposal was we file our motion  
7 for authority to file a late proof of claim. If Your Honor  
8 were to rule in our favor, then according to GM and the GUC  
9 Trust, the music stops and we certify your decision for appeal  
10 to the Second Circuit.

11 THE COURT: Probably not.

12 MR. WEISFELNER: And that's where we sort of --

13 THE COURT: It might go to Judge Furman, who has the  
14 class certification, you know, is going to have to deal -- I  
15 mean, he -- as I understand it, isn't he getting any appeals  
16 from me in Motors Liquidation?

17 MR. WEISFELNER: I think in fairness to their  
18 position, their point is that if Your Honor would have  
19 determined that we're entitled to file a late proof of claim,  
20 it now makes ripe the question of whether or not the relief  
21 that we're seeking is equitably moot, whereas the Second  
22 Circuit said, interesting issue, but there's no case or  
23 controversy --

24 THE COURT: Right.

25 MR. WEISFELNER: -- other than the one you made up on



1 your own.

2 MR. STEINBERG: And, Your Honor, just to answer your  
3 question, Judge Furman hears most, but not all, of the appeals  
4 from you. And --

5 THE COURT: Yeah, I saw because one just got bounced  
6 from Judge McMahon and got reassigned this morning.

7 MR. STEINBERG: I don't know what's the judge --  
8 Judge Abrams has one? Did she have one? Judge Abrams has one.

9 THE COURT: Well, no, I think --

10 MR. STEINBERG: She has the Chenault one, I thought.

11 THE COURT: There was an appeal from my decision  
12 about the funding of the trust.

13 MR. STEINBERG: Okay. But that's not something I was  
14 involved in. I think Judge Abram --

15 THE COURT: No, 2:01:46.

16 MR. STEINBERG: Yeah. I think Abrams has Your  
17 Honor's Chenault decision, where you had indicated that it was  
18 with connection with tires and whether --

19 THE COURT: Yeah, that one was good.

20 MR. STEINBERG: So he's not getting them all. But  
21 Mr. Weisfelner has articulated what I think the Second Circuit  
22 had ruled upon, which is that there was no case or controversy  
23 so that if Your Honor was to allow a filing of the late-filed  
24 claim -- and we would oppose that, but if Your Honor was to  
25 allow that, then what? Because if you then allowed the filing



1 of a late-filed claim, are you going to determine the substance  
2 of the claim?

3 THE COURT: I don't know.

4 MR. STEINBERG: Because that's what Judge Furman has,  
5 and some of the decisions that Judge Furman will be making --

6 THE COURT: He can withdraw the reference on that if  
7 he --

8 MR. STEINBERG: That's correct. And some of the  
9 issues that Judge Furman will be making on that issue includes  
10 whether the brand theory of damages holds. He's already held  
11 that it doesn't hold in that context, and if it doesn't hold in  
12 this context --

13 THE COURT: Don't get nervous that if I allow the  
14 filing of a late claim that I'm going to be the one to decide  
15 the amount, you know, which claims are allowed and which not.

16 MR. STEINBERG: Okay.

17 THE COURT: Okay.

18 MR. STEINBERG: But anyway, that's -- so our view was  
19 --

20 THE COURT: Because it should be one judge who  
21 decides it, not two.

22 MR. STEINBERG: So our view of the threshold issue  
23 was that if they wanted to move the late-filed claims issue up  
24 to a threshold issue, that would be fine. But it seemed that  
25 once they did it, you did have the case or controversy, and



1 then you had to try to figure out what to do next based on the  
2 Second Circuit decision.

3 THE COURT: Yes. And we're going to do that. We're  
4 going to move that along. Okay.

5 MR. STEINBERG: That's fine. We had identified that  
6 as a threshold issue, and we had not said anything more that  
7 once Your Honor rules on it, then it should go. We had said  
8 certified, but Your Honor's obviously correct. It doesn't have  
9 to be certified to the Second Circuit. It can go to Judge  
10 Furman, as well, too, or to Judge Furman because he's handling  
11 the MDL.

12 THE COURT: Yes.

13 MR. STEINBERG: So I understand that, as well. And  
14 --

15 MR. WEISFELNER: Or the third option is Your Honor  
16 may decide what to do, short of determining the allowed amount  
17 of the claims. To the extent that Your Honor determines that  
18 late claims are allowed and the GUC Trust or anybody else wants  
19 to reassert equitable mootness, rather than take it up to Judge  
20 Furman or the Second Circuit, Your Honor may decide as a  
21 preliminary matter, based on what the Second Circuit has said  
22 or Your Honor's own view, because in our view, Judge Gerber  
23 didn't take into account the accordion feature when determining  
24 equitable mootness, that Your Honor may decide you'll take a  
25 crack at it yourself.



1 THE COURT: I might.

2 MR. WEISFELNER: You might.

3 THE COURT: I might well do that.

4 MR. WEISFELNER: There's a third option. That's my  
5 only point.

6 MR. STEINBERG: The --

7 THE COURT: And if it gets to the point of actually  
8 having to decide what the amount, you know, who has an allowed  
9 claim and what's the amount, to the extent that in a different  
10 context and before Judge Furman, he may be the one most  
11 appropriate to decide it.

12 MR. STEINBERG: Right. And Your Honor, the only  
13 other thing I'll say is that whatever they file as a claim,  
14 inherent in the issue -- we'll brief this -- inherent in the  
15 issue of whether they can file a class claim is to whatever  
16 extent Rule 23 reply, most of the cases on class claims  
17 incorporate Rule 23, which is the issue that Judge Furman will  
18 be tackling in the MDL. So I think the purpose of this is to  
19 sort of -- not to try to persuade you on anything today, but to  
20 identify the issue. I think you've given us some guidance.  
21 I'm not sure if there's more guidance you want us to give as to  
22 how to handle the issue and the drafting of the OCS, but that's  
23 all I think I have to say on it.

24 THE COURT: All right. Juts bear -- hang on just one  
25 second.



1 MR. WEINTRAUB: Your Honor --

2 THE COURT: Yeah, just a second, Mr. Weintraub. Go  
3 ahead, Mr. Weintraub.

4 MR. WEINTRAUB: Of course, there are two additional  
5 wrinkles to the late-filed claim issue. With respect to the  
6 pre-closing ignition switch accident plaintiffs, we don't  
7 believe that could be a class proof of claim. We --

8 THE COURT: As to the accident plaintiffs, I Would  
9 agree it couldn't be a class proof of claim.

10 MR. WEINTRAUB: We've been moving, timing-wise, in  
11 lock step with the economic loss people. We have a motion  
12 ready to be filed whenever the Court says it should be filed  
13 with respect to 200 proofs of claim. The problem is we don't  
14 know that that's all of the proofs of claim that might be  
15 filed. Through Mr. Hilliard, we have 200 proofs of claim for  
16 his clients. We suspect, but we don't know that there are  
17 other plaintiffs attorneys with other clients, and one of the  
18 challenges is to how to get notice to those potential people  
19 that they should be filing a motion now, too.

20 THE COURT: Mr. Weintraub, in an entirely different  
21 context, this morning, I reviewed -- reasoned to review a prior  
22 decision of mine where I denied leave to file a late claim, and  
23 the argument was that they didn't have proper notices of bar  
24 date, and I denied their leave to file a late claim because  
25 once they had notice that they hadn't been -- you know, once





1 they found out they hadn't been given proper notice of the  
2 bankruptcy, there was nothing to keep them from filing a motion  
3 for leave to file late claim, and they waited a year and I said  
4 no.

5 All right. So, you know, to the extent you're acting  
6 on behalf of others or other counsel here are acting on behalf  
7 of others, be mindful that as I understand -- I'm not deciding  
8 anything, but as I understand it and decided once before, the  
9 law on motions to file a late claim, you've got to act with  
10 some diligence. So if somebody turns around a year from now  
11 and files a motion to file a late claim, good luck.

12 MR. WEINTRAUB: And I agree with that, but my issue  
13 is slightly different. I don't know who knows and who doesn't  
14 know that they now have the ability to file a late proof of  
15 claim.

16 THE COURT: Well --

17 MR. WEINTRAUB: And we only represent the people that  
18 we represent, and all I'm raising to the Court is there may be  
19 other people out there, and we --

20 THE COURT: I don't control that either. All I'm  
21 saying is that the issue of late claims Mr. Weisfelner raises  
22 before you may have -- I was waiting to see where the motion  
23 was. It didn't come. I see it listed on the issue list. I  
24 didn't particularly agree with the procedure that was proposed.  
25 We've heard more -- I have a little better understanding of it

1 now in terms of the class issues. The class issues are not  
2 going to get decided at this stage. But I can't -- you know,  
3 people will do what they're going to do, and if they're  
4 sleeping on their rights, they're sleeping on their rights.

5 MR. WEISFELNER: Your Honor, the other thing that I  
6 think is important --

7 THE COURT: Let Mr. Weintraub finish. Go ahead.

8 MR. WEINTRAUB: As I said, Your Honor, we're prepared  
9 to file our motion as quickly as possible. What -- and now I'm  
10 just thinking out loud. There are procedures through the MDL  
11 with the state court liaison.

12 THE COURT: Right.

13 MR. WEINTRAUB: And maybe through that state court  
14 liaison, some kind of notice could be given to the great  
15 unwashed that they have to do something. So really, all I'm  
16 asking is that there be built into whatever the next process is  
17 some period of time to at least let that notice happen.

18 THE COURT: Okay. Thank you.

19 MR. WEISFELNER: Your Honor, that was the exact --

20 THE COURT: Mr. Weisfelner.

21 MR. WEISFELNER: -- issue I was going to address. It  
22 seems to me that if Your Honor were to rule in favor of whoever  
23 the moving parties are with regard to the authority to file  
24 late claims, we might, at that point, then decide that the  
25 general unwashed masses out there need to get some form of



1 notice. I disagree with my brethren that it ought to be the  
2 MDL or any part of the MDL. I think the burden ought to fall  
3 on either New GM or, quite frankly, the GUC Trust to give  
4 appropriate notice because they're the ones with a fiduciary  
5 duty to people who filed claims. But put that aside. I think  
6 we can work out notice.

7 THE COURT: I would be very happy if I didn't have  
8 200 motions to file late claims, you know, next week or two  
9 weeks from now, and you know, you want to raise the issue with  
10 the GUC Trust, with New GM, and maybe some other constituencies  
11 that you should about the notion that the issue of leave to  
12 file a late claim will be raised in this -- as a threshold  
13 issue through motions for leave to file a late claim as to  
14 other potential parties. They'll have, you know -- I don't say  
15 a period, a deadline. So they're not gonna going to be bound.

16 I agree, I don't want to -- I don't think there's a  
17 need at this point to have a flood of motions, as long as  
18 people have some assurance that, okay, if leave is granted,  
19 they will --

20 MR. WEISFELNER: And two points --

21 THE COURT: -- have time.

22 MR. WEISFELNER: -- two points in this regard. You  
23 never want to use the courtroom as a bargaining leverage, but  
24 when we talked to the GUC Trust about class-type issues, to  
25 they extent they're going to raise class-type issues in terms



1 of the validity of our motion, one would think that it then  
2 puts leverage on this --

3 THE COURT: Don't make any arguments now.

4 MR. WEISFELNER: Okay.

5 THE COURT: We'll hear the arguments when you --

6 MR. WEISFELNER: The only other point I wanted to  
7 make because Your Honor referenced it a couple times. We have  
8 a stipulation with the parties that, from their perspective,  
9 excuses us from filing this motion until resolution of the  
10 Second Circuit -- and by the way, GM's announced their  
11 intention to seek to reverse and seek certification.

12 THE COURT: Yes, I saw that so far.

13 MR. WEISFELNER: And that'll be part of our briefing  
14 discussion, as well, because as you might imagine, those on  
15 this side of the table will also be involved in briefing  
16 certification. So -- and I'm sure we can work it out.

17 THE COURT: Look, I can tell you right now that my  
18 schedule is pretty full over the next few months. Closing  
19 argument in your other case, Mr. Weisfelner --

20 MR. WEISFELNER: I've heard that.

21 THE COURT: -- is going to be sometime in January,  
22 and -- unrelated to Motors Liquidation, and there is a trial  
23 that I scheduled for April 24th in the adversary proceeding of  
24 JPMorgan and the others. So my schedule is pretty full. I --  
25 you're all going to work out a briefing schedule, proposed



1 briefing schedule, and it's -- I wish I could get to it  
2 immediately, but it's not likely to happen.

3 MR. STEINBERG: Your Honor, one comment and one  
4 suggestion on the late-filed claim issue. If they're going to  
5 move that they satisfied the Pioneer factors, that actually may  
6 require discovery as to whether these people, whoever's moving,  
7 was aware of the bar date, was aware of the ignition switch  
8 recall and slept on their rights. So --

9 THE COURT: Well, when you get the motion, you can  
10 decide whether you -- you can raise --

11 MR. STEINBERG: Right.

12 THE COURT: You can ask them whether they'll agree to  
13 discovery, and if not, you can arrange a conference call with  
14 me and --

15 MR. STEINBERG: What I was going to suggest on the  
16 late-filed claim issue is that it may make sense that -- it  
17 seems to me that the plaintiffs' side has to be the movant --  
18 has the opening motion, opening brief on that.

19 THE COURT: They do.

20 MR. STEINBERG: And it would seem to me that after  
21 that pleading is filed, when we actually see what is there and  
22 we actually have an opportunity to talk a little, maybe before  
23 we do the next stage of trying to respond to it, we have a  
24 status conference --

25 THE COURT: That's fine.



1 MR. STEINBERG: -- to Your Honor and identify --

2 THE COURT: I agree. I agree.

3 MR. STEINBERG: -- all those issues because we have a  
4 lot else to brief and things are very fluid in this case.

5 THE COURT: I agree.

6 MR. STEINBERG: Okay.

7 THE COURT: Okay. All right. Anything else I need  
8 to deal with today?

9 MR. STEINBERG: No. Just -- I think in the status  
10 report, Mr. Weisfelner pointed out to me that I was rather  
11 ambitious about when we would present a consensual presentation  
12 -- consensual order to show cause, and I think I said probably  
13 five business days --

14 THE COURT: I think --

15 MR. STEINBERG: -- and I think we probably need a  
16 little more time. Thanksgiving is coming up.

17 THE COURT: I know it is.

18 MR. STEINBERG: But I said business days, so --

19 THE COURT: I want it by December 7th.

20 MR. STEINBERG: December 7th is a good day.

21 THE COURT: Okay.

22 MR. STEINBERG: Thank you.

23 MR. WEISFELNER: That's fine. Thank you, Judge.

24 THE COURT: All right. Thank you.

25 MR. STEINBERG: Is there anything else, Your Honor,



1 for the status conference?

2 THE COURT: Let me -- just let me quickly -- I have a  
3 lot of notes in here, but I think I addressed my issues. Yeah.

4 We're adjourned. We're in recess.

5 MR. STEINBERG: Your Honor, may I just say one --  
6 just one thing. Just so it's clear what we're going to be  
7 doing, we're going to be trying to identify, through the order  
8 to show cause process, the threshold issues that we've  
9 identified plus the two issues that Mr. Weintraub has  
10 identified.

11 THE COURT: Those are threshold issues.

12 MR. STEINBERG: Those are the threshold issues, and  
13 that's what you're going to be getting as the order to show  
14 cause.

15 THE COURT: That's what I was expecting you to --

16 MR. STEINBERG: What's in the deferred section, we're  
17 not going to be addressing.

18 THE COURT: We're not going to deal with now, and the  
19 language that you proposed about people being bound, yes, I do  
20 want that in there.

21 MR. STEINBERG: Thank you.

22 THE COURT: Thank you. All right. We're adjourned.

23 THE CLERK: All rise.

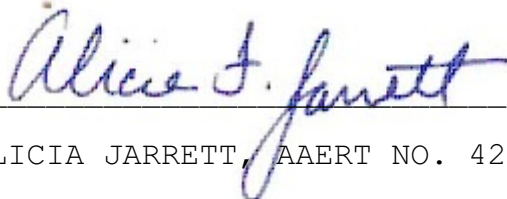
24 (Proceedings concluded at 1:21 p.m.)

25 \* \* \* \* \*



C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter.



ALICIA JARRETT, AAERT NO. 428

DATE: November 17, 2016

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